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BRIEF OF APPELLANT

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United States Court of Appeals

NO. 20917

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

FILED

OCT 14 1966

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NO. 2 0 9 1 7

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS
AND
FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 18 U.S.C. 3231, this being a proceeding on an indictment filed in the United States District Court, Southern District of California, under that court's number 35009.[1]

COUNT ONE charged: "On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland."

COUNT TWO charged: "On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A. McCOWAN, opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office."

[1] The record, pursuant to rules of this Court, is not printed. It consists of four volumes, including the transcripts

The defendant had been previously charged in Case No. 34508 (United States District Court for the Southern District of California, Central Division), and upon disagreement of the jury (they were unable to reach a verdict) the matter was declared a mistrial and set for further trial. Case No. 34508 was eventually dismissed (See: Official Reporter's Transcript p. 693).

The instant case proceeded to trial and at the conclusion of the testimony of the Government's witnesses a motion for judgment of acquittal was made and was by the court denied (Reporter's Transcript of Proceedings [hereinafter referred to as R.T.] p. 178). At the completion of the trial of this matter another motion for judgment of acquittal was made (R.T. p. 420). Under Rule 29, the court reserved a ruling on the motion. Subsequently, at the time of pronouncement of judgment, the motion for judgment of acquittal was denied and judgment pronounced.

[I cont'd] labeled "Reporter's Transcript of Proceedings," and contains all of the testimony taken at the trial and also the proceedings subsequent thereto at the time of hearing motions for judgment of acquittal and pronouncement of judgment; also the official record from the District Clerk, which includes a copy of the indictment, a motion to dismiss and various minutes relating to the trial.

The case was tried before the Honorable Charles H. Carr, United States District Judge for the Southern District of California, sitting at Los Angeles, California, with a jury.

In this case, at the time of judgment, testimony was taken in the nature of pre-sentence testimony and is to be found in the Reporter's Transcript of those proceedings at pages 572, 616 and 644. Judgment is shown at page 688. The defendant-appellant was sentenced to the penitentiary despite a provision that he be committed for study. The defendant was released upon a motion for bail pending appeal (R.T. p. 688). As has been stated, Case No. 34508 was dismissed (R.T. p. 693).

Prior to trial, a motion to dismiss the indictment was made and was by the court denied. This motion was based upon the ground that after a trial by jury in which the jury disagreed and a mistrial was declared, a superseding indictment was returned by the Grand Jury and a substantial change was made in one of the counts of the indictment. The superseding indictment in this case presently on appeal was in the following language: (Count Two - Case No. 35009) That the defendant "opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office." Count Two in the original indictment (No. 34508)

alleged that the defendant "had in his possession the contents of a package." The superseding indictment was altered by adopting different language, a different code section and a different sense.

A notice of appeal was timely filed and is found in the Clerk's Transcript.

A designation of record on appeal was duly filed and is found in the Clerk's Transcript.

The judgment is found in the Clerk's Transcript.

JURISDICTION

This Court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and Rule 37a of Federal Rules of Criminal Procedure.

STATUTES INVOLVED

The defendant-appellant is being prosecuted under sections 1702 and 1708 of Title 18, United States Code, which provide in pertinent part:

18 U.S.C. 1702:

"Whoever takes any letter, postal card, or package out of any post office

or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

18 U.S.C. 1708:

"Whoever steals, takes . . . or by fraud or deception obtains . . . from or out of any mail, post office, or station thereof . . . any letter, postal card, package . . . shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

SPECIFICATION OF ERROR

1. The court erred in denying the motions for judgment of acquittal. The evidence was not sufficient to sustain the trial judgment on both counts or either count.

Ancillary to this, and controlling, we respectfully urge that the court had no jurisdiction to try this case. McCowan was a sender, and when the package was returned to him the postal authorities and the United States District Court lost jurisdiction to try McCowan.

2. The United States Attorney was guilty of misconduct in the course of cross-examination of a character witness of the defendant-appellant - such as could not be cured by an instruction to disregard the same, as given by the court.

3. Incidents which denied defendant-appellant a fair trial, as guaranteed by the Constitution:

A. The new indictment after the mistrial, switching the allegations and doing so to encompass the testimony developed in the first trial. (See Motion to Dismiss - Clerk's Transcript.)

B. The question put to one character witness

and sought to be presented to the numerous character witnesses.

C. The questions put to the defendant-appellant about his legal education.

D. The questions about defendant-appellant's intimacy with the government's female witness.

SUMMARY OF ARGUMENT

1. We contend that the evidence was not sufficient to show the crime charged. McCowan was the sender, and the facts indicate it. The United States District Court was without jurisdiction to try the case (See *United States v. Bullington*, 170 Fed. Rptr. 121). The court permitted all of the details of what happened after the delivery to McCowan. If a crime was committed, the State had jurisdiction.

2. A character witness was asked on cross-examination if he had "heard that Mr. McCowan passed worthless checks in the sum of \$12,568.00, and that as a result of this it was a major factor in a man losing his business?" This was gross misconduct and could not be cured by an instruction (*Krulewitch v. United States*, 336 U.S. 440).

This was misconduct (*Vierick v. United States*, 318 U.S. 236, *Berger v. United States*, 295 U.S. 78).

3. We contend that the following incidents denied defendant-appellant McCowan a fair trial.

A. The superseding indictment charged a new offense - after a mistrial had been declared. The government then tailored the indictment to attempt to cover defendant-appellant's testimony.

B. The question put to the character witness about defendant-appellant passing bad checks and ruining a man's business, and sought to be put to other witnesses.

C. Questions put to the defendant-appellant about his education as a lawyer. This put the appellant, a policeman, in a position where the jury might well have required a standard of conduct from him different from some other person.

D. The questions about defendant-appellant's intimate relations with the government's female witness. This violated the rule as laid down in *Berger v. United States*, *supra*, 295 U.S. 78.

STATEMENT OF FACTS

FOR THE PLAINTIFF-APPELLEE:

JEAN ORTIZ stated that she knew the defendant. She had met him in September, 1964, at the Woodley Inn. At that time her sister Joan Ansel was with her. She saw the defendant from time to time thereafter. (R.T. [hereinafter in this Statement of Facts the page number only will be shown to indicate the location in said transcript] p. 25-27.) At the time of meeting the defendant she had been living with her sister Joan. Her sister left California. Prior to leaving, her sister left three diamond rings (Exhibits 1, 2 and 3) to be held for her. (27) She identified the exhibits. After her sister left California, she received a telephone message from her. Mr. McCowan brought the rings to her house and they wrapped them in a package (Exhibit 4). That was the box they sent the rings in. They went to the Police Station to get some string for the package; they were in her car. Mr. McCowan went into the Police Station to get his check and pick up some tape and string. He taped up the package and put string around it. She gave Mr. McCowan the address to which the package was to be sent. She saw him write the address. (30-32) He wrote her address on one side and the address of her sister. He put his name plus her post office

box on the package. Her post office box was No. 2754; it was used by her sister and herself. They drove to a branch post office and Mr. McCowan said it would be better to go to the main office. (32-33) She handed the package to the postal clerk and it was mailed. (34-35) She and McCowan then drove back to her place. They came out of the post office building together. After mailing the package on October 21st, she later talked to her sister. She later made inquiry at the post office. The information on Exhibit 5 she gave to the postal official about November 17th. She had a conversation with Mr. McCowan after the package had been mailed and before she went to the post office, and he said that the package had probably been lost in the mail. (39-40) She told Mr. McCowan that, because her sister had not received them, she had sent a tracer out for the rings. (40-41) He made no statement. (41) After Mr. McCowan was arrested she had a conversation with him, just Mr. McCowan and herself were present. He said that the only reason he took the rings was to sell them to get money; that he was going to give her the money. (42) Mr. McCowan told her he had never done anything like that before, and she told him that if he would give the rings back she would not press charges. (42) She had had another conversation with Mr. McCowan; this had been in the presence of Jerry Vaccaro.

At that time McCowan asked her if she would plead the Fifth Amendment and not say anything in court, and she told him she could not do that, that it would make her look guilty. (43) Mr. Vaccaro said that she could forget a lot of things. (44) She did not remember whether Mr. McCowan said anything about forgetting things. (44)

(Exhibits 1 to 5 were admitted in evidence.) (45)

On cross-examination she testified that when she first met Mr. McCowan she learned that he was a Los Angeles policeman. At this time, in her presence, her sister told Mr. McCowan that her husband was in jail in Maryland and she wanted to locate exactly where he was and what had happened to him. (47) Mr. McCowan had replied that he would try to find out what he could about her sister's husband. Later she and her sister and McCowan went to a house on Royal Oak; there they had a conversation with Mr. McCowan about furs, diamond rings, jewelry and guns. Certain jewelry, diamonds, fur coats and guns were taken to the house on Royal Oak. (49-50) Later she had a conversation with Mr. McCowan about removing the articles to a cabin in the mountains for safekeeping. (50) She knew that her sister had given McCowan some guns, some rifles, and a surgical kit; that her sister had told McCowan that the surgical kit had been used by her to remove a bullet

from her husband's body. (50) After her sister went East she talked with her from time to time. She denied ever telling Mr. Jerry Vaccaro that she was desperate for money. She knew Mr. Vaccaro. She had visited Mr. Vaccaro at his house. She denied that she had a conversation with Mr. McCowan in which Mr. McCowan told her that he did not want to return the guns to her, that he needed the guns in his forthcoming trial, and that he felt the guns would be used in an attempted jail break. (53) She denied telling McCowan that she thought that he had given information to the police which had resulted in the arrest of her husband. She denied telling Mr. McCowan that she had talked long distance with her sister Joan and that her sister had told her that she had information that McCowan had given information to the police which had resulted in the arrest of her husband. She testified that her husband had been tried for robbery in this community and convicted and went to prison. (58) She denied telling Mr. Vaccaro that she thought Mr. McCowan had something to do with it. She denied accusing McCowan of having had something to do with it. (59) Her husband was arrested about October 26, 1964. (59) She identified a photograph (Exhibit A) as a fair representation of a surgical kit and some of the small guns and rifles her sister Joan had.

(Exhibit A was received in evidence.)

(62)

She had sold one of the fur coats her sister had left with her. Mr. McCowan had had possession of the coat for safe-keeping. Mr. McCowan gave her the coat upon her request. (63) She sold the fur coat that McCowan gave her; she sold it because she needed the money. She did not remember whether McCowan gave her the diamond rings at that time or not. (66) She denied ever telling Jim Malucci and Jerry Vaccaro that she and her sister Joan had dressed as men and had performed robberies. (67) She then stated that Jerry Vaccaro had asked her for stories and she had told him that she and her sister had performed robberies. (68) She made up stories when he kept questioning her. (68) She denied telling Mr. Vaccaro that her sister had not given her her share of the robberies. (69-70) She had been friendly and affectionate with Mr. Vaccaro. (70) When she went to the post office, she knew that Mr. McCowan's name was on the package as the sender. (72)

EDWARD TULLY testified he was a postal clerk at the Van Nuys Post Office, Main Office. He was so engaged in October of 1964. Mr. McCowan came to the window at the post office; McCowan was in a police uniform and identified himself as a police officer. McCowan asked him if it was possible to withdraw a package from the post office, that

he was working on a case, that he would be in the following day with a young lady and they were to mail a package. (90-91) He referred McCowan to Garth Gledhill, the assistant postmaster, stating that it was possible. On the following day, October 21, McCowan came in with a young lady (Jean Ortiz); they approached his window. The young lady handed him a package and said she wanted it mailed. He could not say who handed him the postage. McCowan was standing a little behind her and just to her right. He could not say whether he stepped up and gave him the package or she did -- or the money; he did not recall. (92) Mr. Gledhill came into the post office later and he handed Mr. Gledhill the package that had been mailed by the defendant and Miss Ortiz. (92-93)

On cross-examination he said that he had probably seen thousands of people since that event. At the previous trial he had stated that he was not sure who gave him the package; he was not positive. (94-95)

GARTH GLEDHILL testified that he was assistant postmaster at the Van Nuys Post Office. He recognized the defendant McCowan. On October 20, 1964, he saw McCowan; McCowan had been dressed in a uniform and had the badge of a Los Angeles policeman. McCowan wanted to know if there

was a procedure by which a package could be withdrawn from the post office. McCowan stated that he was working with the Police Department on an investigation involving a couple of girls; McCowan assumed they were going to mail a package and wanted to withdraw the package for further investigation. (98-99) The following day he talked with Mr. McCowan on the phone and Mr. McCowan told him the package had just been mailed and that he wanted to withdraw it; McCowan gave him the information, a street address in Granada Hills and his (McCowan's) name as the sender and Joan Ansel's name as the addressee at the Colonial Manor Motel in Rockville, New Jersey. He placed part of this information on a form (Exhibit 6 - Form 1509, a sender's application for recall of mail). (100-101) He put a change on the form after picking up the package. He saw the defendant in about 30 minutes; the defendant came to his office. He asked the defendant about the street address originally given; this was not what was entered on the package. The defendant told him he had placed the post office address of Jean Ortiz on the package in error. The defendant signed application form No. 1509. (102-103) He gave the package to the defendant.

He stated on cross-examination that he had filled in the application himself; that he had written thereon "wrong contents." (104) McCowan told him that he was the sender

and McCowan's name appeared on the package and so he returned the package to McCowan. (105)

(Exhibit 6 was received in evidence.)

JOHN BRAYMAN testified he was a jeweler with M. Weinstein, Inc. He had a conversation with Mr. McCowan about diamonds; McCowan had stated that he had received the diamonds from relatives back East and wanted an appraisal. (109-110) Exhibits 1, 2 and 3 were shown to the witness. He had examined these rings and had made an appraisal. (111-112) The defendant had come back about three hours later and picked up the appraisal (Exhibit 7). Two copies of the appraisal were given to the defendant. (112-113)

(Exhibit 7 was received in evidence.)

THE DEPOSITION OF JOHN BROOKS RUNYON WAS READ INTO THE RECORD: He knew Mr. McCowan; had met him through an acquaintance, John O'Grady of the Los Angeles Police Department. (116-117) He had had a conversation with McCowan in 1964. McCowan said he had some jewelry and wanted to know if he would be interested in buying it. McCowan said he owned the jewelry or he had acquired the jewelry in a real-estate deal. (118-119) He was to consider buying the jewelry or possibly selling it. (120) He turned the rings over to

Mr. Matheny. (123) He later received \$1100 from Mr. Matheny for the sale of the large ring - the two-carat lady's ring. (124) He gave the money to McCowan. (125) On cross-examination he testified that the defendant was referred to him by John O'Grady, a sergeant in the Los Angeles Police Department. (127-128) He believed that Mr. McCowan had said they could take their time, that there was no hurry for a quick sale, that they could take their time and get a better price. (130) There was an advertisement placed for the sale of the rings. (131)

CHARLES MATHENY testified that he was a jeweler. He first saw Exhibit 1 through 4 about Christmas, 1964, at Brooks Runyon's home. (139-140) He was to appraise the rings. The rings (Exhibits 1 - 3) were contained in Exhibit 4 (a black box). (140-141) He sold the large two-carat ring (Exhibit 1) to a Mr. Tanzey. (142)

WILLIAM H. TANZEY testified that he bought a ring from Mr. Matheny, that he paid him \$1100 for it before Christmas of 1964. He identified Exhibit 1. He gave the ring to his wife and later had to take it away from her. He later gave it to Postal Inspector Jensen. (145-148)

On cross-examination he stated that he later was paid

the \$1100. (148)

STANLEY H. JENSEN testified that he was a postal inspector. He first saw Exhibit 1 in the office of Attorney Guziel at Canoga Park. (149-150) Exhibit 1 came into his possession at that time. Brooks Runyon gave him Exhibits 2, 3 and 4 in January of 1965. (151) The box had the impression of writing upon it, the address of Joan Ansel, Colonial Manor Motel, Rockville, Maryland. He could also see the impression of Box 2764 Van Nuys in the corner. He saw an impression also that was not legible. (151-152) He knew McCowan; he first met McCowan on January 6, 1965, in the Van Nuys Police Department. He had a conversation with McCowan at that time and place; he told McCowan he was a postal inspector, showed him his certificate, advised McCowan of his constitutional rights, that he did not have to make a statement and that any statement he made could be used against him and that he had the right to the services of an attorney at any time. McCowan told him that earlier in 1964, in the late summer, he had met Jean Ortiz at a small restaurant and bar in Van Nuys in which he had a small ownership; that he had introduced himself to her and she was a customer; that he subsequently informed her that he was a police officer with the Los Angeles Police. McCowan

had mentioned to him that he had been instrumental in the transaction of the sale of this bar from one person to another, his friends, and as a result he had received a 2% interest. (153-154) (The court instructed the jury to disregard the last statement. 154-155) McCowan had stated that certain property, including guns, furs, valuable property, had been transferred to him for safekeeping by Joan Ansel, the sister of Jean Ortiz; that Joan Ansel's husband had been arrested in the East and that she felt she could trust him as a policeman. McCowan told him that he wanted to run the guns down to see if they had been used in robberies; that he had gone to Detectives Long and Moulder who were in the robbery detail and told them he had become friendly with the two girls and that he thought they were connected with or married to men who engaged in criminal activities and that he thought he might get further information from these girls which would be helpful in solving robberies in the Valley. McCowan told him that he had been told by one of the two detectives, he thought it was Mr. Long, that he should not retain this property once he had gotten the serial numbers and the various information; that he should get the stuff back to the girls. He told Mr. McCowan that the purpose in interviewing him was to investigate a parcel that had been mailed by Jean Ortiz

which was reported lost in the mails by the addressee, Joan Ansel, and by the sender, Jean Ortiz. Mrs. Ortiz had told him that Mr. McCowan had gone to the post office at the time of mailing and, therefore, they felt that he (McCowan) could add materially to the facts. (156-157) McCowan told him that he knew all about the package, that prior to mailing he had gone to Mr. Gledhill and had advised Gledhill that he was a police officer, that he would mail a package in the company of a girl and that he would withdraw the package shortly after the mailing. McCowan told him that he withdrew the package and took it to the police station where it was opened. (157-158) McCowan told him that when the package was opened they found it contained identification cards. McCowan told him that after finding the box had no narcotics in it, he was told by Long and Moulder to get this package back in the mail. McCowan told him that the box contained identifications, nothing more. McCowan told him that he had put it back in the mail. Later McCowan said he might still have the package; that he believed he had put it in a coat pocket. Later in the interview McCowan said, "Well, I have to be honest with you guys, I lied to you. Actually I threw the package away." (157-158) McCowan told him that he had thrown the package away as he "didn't want these guys to have this -- these people to get back these phony IDs . . . I

thought they shouldn't have them, so I just threw it away."
(158-159) He told McCowan, "Well, you lied to us about the
prior disposition, first you told us you mailed it and then
you told us that you had it in a coat pocket at home, and
now you tell us that you threw it away." (159) McCowan said
that he did not know anything about the three diamond rings.
(159-160)

On cross-examination he testified that he had filed a
report that he had interviewed McCowan and a brief summary
of the gist of the conversation. He was reluctant to produce
a copy of his report but was ordered by the court to do so.
(162-163) He stated that at the time he talked with Mr.
McCowan he had no warrant for McCowan's arrest. (166) During
the course of his conversation with McCowan, McCowan had said
that he wanted to talk to an attorney; they had encouraged
McCowan to do so. (167) McCowan had stated that he had become
acquainted with Jean Ortiz and Joan Ansel and that he had
reported this to Mr. Long, Sergeant of Detectives; that he
(McCowan) had learned that Ansel's true name was Christensen
and that he was investigating the complicity or participation
of these parties in robberies. (167-168) McCowan told him
that he had attempted to ingratiate himself with these girls
in order that he might get information; that from time to time
he had kept in touch with Sgt. Long; that he thought these

people were attempting to liberate Ansel from jail. (168-169) McCowan told him that he was investigating these people; that he did not want to see them get the identification cards; that he had come across a number of guns that these people had, hand guns and rifles. (169-170) His report says, "He consistently denies theft of the rings." McCowan had denied that he had ever taken anything from these girls by theft and had stated that he was willing to submit to any test; that he was doing this as a police officer, endeavoring to solve a crime if he could. (172) McCowan told him that he had reported from time to time to Sgt. Long at the Van Nuys Police Department.

J. P. KEOWN testified that he was a postal inspector and had worked on this case with Inspector Jensen. (176)

THE GOVERNMENT RESTED.

Motion for judgment of acquittal was made. (178) *United States v. Bullington*, 170 Fed. 121, was cited to the court in support of the defendant's contention that the evidence was not sufficient to sustain the charge. Motion was denied. (182)

FOR THE DEFENDANT-APPELLANT:

MICHAEL McCOWAN testified that he had been a police officer for the City of Los Angeles for about 10 years; that he graduated from law school in January of 1964; and that he had a family. At the Woodley Inn in 1964 he had met Jean Ortiz and Joan Ansel or Joan Christensen; at the time he was attempting to help a friend, Jerry Vaccaro, who owned the Woodley Inn. (190-191) Joan Ansel, the taller of the two girls, asked him if any tall fellows came in. He told her he could introduce her to some nice, tall policemen, and the girl said, "If you knew who I was you wouldn't have made that remark." He thought about it and said, "What is the matter, don't you like policemen?" She said, "Are you a policeman?" And he said, "Yes, I am." She then said, "My husband is Kenneth Malcolm Christensen, he was just arrested back East. He was one of the ten most wanted men of the FBI." He said that he had not heard of him. (192-193) She asked him if he could find out anything about her husband and he said he possibly could. She wanted to find out where her husband was, that he had been picked up for robbery and was involved in robberies in Maryland. Jean Ortiz was sitting there within hearing distance. He talked to them a few days later. In the meantime he had relayed

this information to Sgt. Long of the robbery detail, Detective Bureau. These girls were driving a 1964 white Pontiac and Sgt. Long said to find out what he could, that they might have guns in the locker panels. He called the bar and told the bartender, Jim Loreno, to call him if the girls came in. Four or five days later he received a call from the bartender that the girls were there. He had the bartender check to see if the car was outside. He then talked with the taller sister on the phone. He made arrangements to meet her the following day. After reporting to the robbery detectives, he met her; he reported to Sgt. Long. (193-196) He met Joan Ansel/Christensen; at that time she was driving a '65 Pontiac; she went to Maywood with him. She told him that her husband, Christensen, had been involved in robberies; that they were married in April of that year and had gone on a trip throughout the country and she drove the get-away car in robberies for her husband, he had pulled a lot of jobs and had used a lot of aliases. (197-198) She told him that she and her husband had gone to a motel in Maryland and had gone out for dinner to case the place that they were going to rob the next day; that the next day they went back to the place and when he came out people were chasing him and she heard police sirens; that she drove toward him and he waved her on; that she went to the motel, picked up the fur coats and diamond rings and guns

and drove directly to California. (198-199) She told him that she had stored some of the stuff and given some of the guns to a girl in Hollywood. She took him to the vicinity of this girl's apartment; she left the car and later returned with another woman; over the back wall they handed him five guns, rifles in their carrying cases. He put these in the back of the Pontiac. They then drove to her apartment. He did not go up with her. She brought down two fur coats and some diamond rings. They then drove to 15627 Royal Oak Road in Sherman Oaks, an empty house that he was caring for. (200-201) They took the fur coats, diamond rings and the rifles into the house. The diamond rings were the same ones as those in court. (202) He identified Exhibit A, a photograph of the rifles and guns which had been taken into the house. He met her at the same house the next day. She arrived with Joan Ortiz. At that time she had a bunch of clothes which she said were her husband's, and a medical kit which she said she had used to remove a bullet from her husband's leg. (204) In the left-hand corner of Exhibit A was the kit. (205) After first going to the house he had been afraid the girl might remove the things, so he had removed them; he and his wife removed them to his home. He reported to Sgt. Long that he had seen these guns and the surgical kit. (206-207) After the hand guns, medical kit,

etc. had been placed in the house on Royal Oak, he and his father had returned and removed them to his home. The girls asked him where the other stuff was, and he told them he had already taken it to the cabin. His father had helped him move the things and when he arrived home his father, his mother and his wife were all there; they saw all the objects. (208-209) After removing this material he had talked one night with the girls and Joan Ansel said she was going to Baltimore, that she and her husband had a pre-arranged plan and she intended to help him break out of jail. (210) She said she might need the guns to break her husband out; that she might want him to give back the stuff to her sister. He did not see Joan Ansel again. He later saw Jean Ortiz. Joan, as far as he knew, went to Baltimore. (210) He checked with the FBI about the guns and the furs. (211) Later he met Jean Ortiz at her apartment and she said her sister wanted to get the fur coats and diamond rings back; that she and her sister had never gotten along; that she was afraid of her sister Joan and that Joan was a vicious person. (211) Jean Ortiz wanted the diamonds and the fur coats back and the guns. He led her to believe the guns were still hot. Some time later she said her sister wanted the diamonds and the fur coats; she said that she was going to sell the fur coats and send the diamonds back to

her sister. In the meantime her husband had been picked up for robbery and she asked him if he had turned her husband in. He told her no, "I am involved in this thing as much as you." He said this so that she would not get suspicious. (212-215) He and Jean Ortiz prepared two packages; the diamonds were placed in a package and there was a second package. He proceeded to wrap the package with the diamond rings in it and addressed it to her sister. When he went to wrap the other package, he shook it and asked what was in it, and she said, "Now you are talking like a cop." They did not have enough wrapping material, so they did not go to the post office that evening. He had gone to the post office to check about recovering a package. On the 21st of October she told him that she had talked with her sister and had told her sister that she was desperate for money and was going to sell the fur coats and the diamond rings, and her sister had said, "Go ahead and sell them out there. I am in need of money too. Take what money you need for your husband's defense and send the rest to me." Jean asked him if he could sell the diamonds and he said he would try, that he had never sold any. She then gave him the diamonds. (218-219) He had told the man at the post office that he was a policeman and engaged in an investigation, that there was going to be a package mailed and that he did not know the

contents of the box but that it was about the size of a "hyp" kit and he thought it might possibly contain narcotics; that he had worked his way in with two females; and that he would like to retrieve the package from the mails. The postal employee told him if his name was on it as sender he would be able to retrieve it if he could identify it, sign a piece of paper stating that he had received it from the Service, so that the postal inspectors would know where the package went. (220) They did not have enough packaging material, so he and Jean Ortiz drove to the Van Nuys Police Station where he worked; he had done this for three reasons, (1) he wanted to get additional packaging material, (2) it was near the main post office, and (3) he wanted to check and see if any of the detectives were in the squad room, so that he could advise them how things were going. (220) None of the detectives to whom he had reported were there. He got the additional packaging material from the Detective Bureau. He completed the wrapping of the package in the car, Jean Ortiz's car. His name was put on as the sender. The return address was the post office box belonging, he believed, to Joan Ansel in Van Nuys. The package was presented to the clerk at the post office; he and Jean were standing directly together. He did not recall who actually handed the package in. He gave Jean the money for the postage. (221-222) The

diamonds were not in that package; the diamonds were in his pocket. He later returned to the post office and obtained the package from Mr. Gledhill. He signed a document there. Mr. Gledhill filled in a portion of the document. (223) He did not in any manner actually attempt to take the property with the intent to appropriate it to his own use. (223-224) He took the package to the police station and kept the package in his locker. The following morning he showed Sgt. Long and his partner -- he believed it was Sgt. Miller -- the package. Detectives were coming and going. The package was opened and they found inside a driver's license in the name of Michael Ancell (Ansel) or Michael Yosef Ancell (Ansel), which was one of the aliases that Joan Ansel's husband had used. There was also an FCC pilot's license and several other pieces of identification. Sgt. Long gave him back the package and said, "I think the best thing for you, so that they will not get suspicious of you, would be to place it back in the mail." (225-226) He did not do this. He felt that if they got the identification they would use it in connection with the jail break. With reference to the diamonds, he checked around the jail to see if anybody was familiar with selling diamonds. Sgt. O'Grady said he was. He showed O'Grady the diamonds and O'Grady told him to go see Brooks Runyon. (227-228) The

diamonds were sold and Brooks Runyon gave him the money, \$1100. (228-229) In connection with this conversation with Mr. Jensen, he did first deny any knowledge of the diamonds. He said he prefaced his statement, when he talked about the diamonds, by telling him that he wanted to talk to his attorney. He did talk to an attorney later. (230) He told Jensen a misstatement because he was a little bit frightened at first and taken aback that they did not believe his story. He asked them if they would give him a lie detector test and they refused. He asked to be confronted with the girl and they refused that. Later he talked with Jean Ortiz at the Woodley Inn over the telephone. He and Jerry Vaccaro had arranged to have her there. Also there was present Ira Reiner. In the conversation Jean asked him to give the guns back and he told her that he was not going to give the guns back because she knew they were going to be used in a jail break and he could not in good conscience give them back. She said, "So what?" (233) He never at any time asked Jean Ortiz to take the Fifth Amendment. He never told her to color her testimony in any respect. He told her to tell the truth. (233-234)

The guns which he took were all operable. (268) The guns were removed from the Royal Oak address to his home;

one night he and his wife took some and the next night he and his father took some to his home. (268) He first took down all of the serial number. He gave Sgt. Long the serial numbers; he either informed him or assumed that he knew that he had them in his possession. (268) He was asked if he knew that it was a violation of police regulations to keep property seized in his personal custody, and he stated that he did not know there was such a regulation. (270) He stated that when the packages were wrapped he put his name on both packages. (275) The package containing the diamond rings (Exhibit 4) was in his pocket when he went to the post office. (278) The package containing the diamond rings was not to be mailed. Before he withdrew the package, he told either Sgt. Long or Moulder about removing the package from the mail. (278) He denied taking the diamond rings from the mail, making a switch and taking another package with the identification to the police department for an alibi. (281) He said he talked to Jensen, the postal inspector, about the package that was in the mail; he thought that was what the interview was about. (283) The package he was concerned with was the one he thought contained narcotics and that was the one he wanted to get from the mails. (284) The only thing he was interested in at the time of getting the package was to find out what the contents were. (285) Sgt. Long suggested

he put the package back in the mail for his own security, so the girls would not get on to him. He had information there was going to be a jail break; he gave the police information about it. He thought if there was going to be a jail break and they did not have the ID card they could not use it. (287) There was only one package mailed. (287) The package with the diamonds was never mailed; it was wrapped and marked because it was to be mailed. It was wrapped and marked two days before the diamonds were to be sent; the package was not mailed that night because it was late and they were to get insurance on the diamonds, because they were valuable. (287) Jean Ortiz had the package. He got the package the day that they were to mail the package that contained the identification. Jean Ortiz said she had been in touch with her sister and her sister had said that it was okay to sell the fur coats and the diamond rings and use the money that she got from the sale for her own purpose and send the rest on for her because she needed money also. (289) At the time he went to the post office he had both packages with him. (289) He opened the package to get the diamonds and he sold them; Jean Ortiz authorized him to sell them. (290) He was asked if during all of this time he was not making love to Jean Ortiz and, over objection, answered, "Yes." After selling the diamonds he took the

money home and put it in his desk drawer. (293) \$1100. He did not tell Sgt. Long; he was not working at that time after he had received the money. (293) He did not give the money to Jean Ortiz because he had moved and he did not have her address. He was off duty, not working, his wife left home to go East - her mother was dying, and he remained home with the children.

IRA REINER testified he was an attorney employed by the City of Los Angeles in the City Attorney's office, Criminal Division. (297) He had lived in Los Angeles all of his life. He and Mr. McCowan were friends. He had talked to Jean Ortiz at the Woodley Inn about two weeks prior to the former trial. He was waiting for a tall blond to come in and approach Jerry Vaccaro. A tall blond walked in and approached Vaccaro. Vaccaro picked up the phone and made a call. After Vaccaro finished dialing he picked up the phone and listened. He heard Mike McCowan. McCowan said, "Hello, Jerry," and Jerry Vaccaro said, "This is Jerry." Vaccaro then turned to the tall blond and said, "I have someone here to talk to you, Jean," and he handed her the telephone. He was about the distance from the witness box to the attorney. He heard the woman say, "I want the guns." McCowan replied, "I don't believe I should return the guns

to you, because I understand they are about to be used in a jail break," and he heard the woman reply, "So what?" (298-299) Those were the precise words. (299) People in the community who knew Mr. McCowan and knew the general reputation of Mr. McCowan at the time of the happening of the incidents in this matter, knew that Mr. McCowan's reputation for truth and honesty was excellent. (299-300) He had studied for the Bar with Mr. McCowan. An objection was sustained by the court when he was asked if he knew Mr. McCowan had passed worthless checks in the sum of \$12,568 and as a result this had been a major factor in a man losing his business. (301)

GERARD VACCARO testified that he was a Los Angeles Times dealer and operated a bar-restaurant in Van Nuys at Woodley and Saticoy. (307) He had met Jean Ortiz. There was a time when Jean Ortiz told him that she and her sister had dressed as men and had performed a robbery. They had obtained some \$10,000 in a robbery. Jean Ortiz had told him that her sister Joan had not given her (Jean) her share of the money obtained in robberies. (307-308) In the presence of Joan, Jean told him that they wanted the guns from Mr. McCowan, as they were to be used in an attempt to deliver Joan's husband from prison. (308) He had known Mr. McCowan since 1953; he was friendly with him; and he knew people

who knew McCowan. He knew McCowan's general reputation at or about the time of the happening of the events under inquiry here, and he knew that McCowan's general reputation in the community as to honesty and truth was very good. (309-310)

ROSEMARIE GRUENWALD testified she was a Deputy Attorney General for the State of California, in the Criminal Section; that she knew Mr. McCowan; that she had known him five years; that she knew people who knew him; and she knew McCowan's general reputation at or about the time of the occurrence of the events in 1964 for truth and honesty in the community and his reputation for those qualities was good. (312-313)

JAMES A. MALUCCI testified he had been in the painting industry in the Los Angeles area for 20 years. He knew Mr. Vaccaro; had known him for 20 years. There was a time in 1964 when he met Jean Ortiz. He was present at a conversation with Mr. Jerry Vaccaro and Mrs. Jean Ortiz when Jean Ortiz stated that she and her sister Joan had dressed as men and had staged a robbery in which they obtained approximately \$10,000. (314-315)

CATHERINE MCCOWAN testified that she was the wife of

the defendant. In 1964, about September or October, she went to Royal Oak Street with her husband. They obtained some articles there: two mink coats and some diamond rings. She saw the diamond rings. Exhibits 1, 2 and 3 were shown to her. They appeared to be similar in character to the rings she saw that day. (319-320) One fur coat was a long mink coat and the other was a mink stole. This house was an unoccupied house; her husband had been doing a favor for the owner and watching the grounds, keeping an eye out. These articles were taken to their home for safekeeping. The guns were taken to her father-in-law's apartment. (320-321) After being taken to her house, they were removed the next night to her father-in-law's apartment. (321-322) There was a time when there was a conversation between herself and her husband about the sale of the rings. Her husband brought home eleven \$100 bills in a white envelope and the money was kept in a desk. She knew it. Her husband told her where it was. None of this money was ever spent while it was there. At the time of his arrest, Mr. McCowan gave the money to the attorney and the attorney returned it to the owner. (322-323)

GERARD VACCARO was recalled. Shortly before the

previous trial he had a conversation with Jean Ortiz and Joan Ansel or Christensen. This conversation was at the airport. There was a later conversation; a discussion between Jean Ortiz and Joan Ansel/Christensen about the division of money. Jean Ortiz stated that she had not received her fair division of the results of a robbery, or words to that effect. The conversation was recorded. He had since listened to the recording and it was accurate. He had a tape for it. He identified the tape in question; the tape was marked Exhibit B for identification. (327) This was a recording of Jean Ortiz, Joan Ansel and himself.

NICHOLAS CIPRIANO testified that he knew Michael McCowan; Michael was his stepson. Prior to the other trial, in 1964, he went with Mr. McCowan to an address on Royal Oak. There he saw a number of firearms, ammunition and a medical kit. He helped pick these items up and take them to McCowan's house. (330-331) There were side arms, .38 revolvers and derringers; there was ammunition and a medical case. He later saw the rifles. (331-332) He also saw some diamond rings. He helped Mr. McCowan take the property from his place to the witness's apartment. He took the rifles, the revolvers, the ammunition and the medical kit. (332-333) They were taken to his apartment prior to the former trial.

He looked at Exhibit A, a photograph of the rifles, hand guns and the surgical kit, and said this was a fair representation. (333)

EARL OSADCHEY testified that he was a special assistant to the District Attorney of Los Angeles County; that he knew Mr. McCowan; that he had known him since 1960; that he knew people in the community that knew Mr. McCowan; that he knew the general reputation of Mr. McCowan in the community for truth and honesty and Mr. McCowan's reputation for those qualities was good. (334-335) In response to the court he said he was a special assistant and a lawyer on the staff of the District Attorney. (335-336)

DAVID VICTOR STANTON testified he was a retired police sergeant and had been on the police department 20 years; that he knew the defendant; that McCowan worked for him as a patrolman; that he knew people in 1964 in the community who knew McCowan; that he knew McCowan's general reputation for truth and honesty in the community in 1964; and that McCowan's reputation for truth and honesty was good. In 1964 Mr. McCowan discussed with him the subject of obtaining a package from the United States mails. This was in the watch commander's office in the Van Nuys Station. (337)

With reference to getting a package out of the mails, he told McCowan to go over and talk to the postmaster and find out from him how to do it. There were times when McCowan worked for him that McCowan received special commendations. (338) Mr. McCowan had told him that he thought there were narcotics in the package. (338-339) Mr. McCowan talked to him about some diamond rings, and he directed McCowan to his father-in-law with reference to selling the diamond rings. (339)

ALICE CIPRIANO testified she was the mother of Mr. McCowan. In 1964 there was a time when some guns and diamonds were brought into her home. She looked at Exhibit A, a photograph, and said that was a fair representation of the property brought into her home. Her husband and son took an inventory of the property indicated in Exhibit A. (341-342) She had seen the diamonds and the coats previous to her husband and son going to pick up the remainder of the guns. (342-343) The property had been taken to her house in case the girls knew where her son lived and came to get it before it had cleared with the department to find out if these items had been used in robberies or murders.

JOHN E. O'GRADY testified that he was a police officer

for the City of Los Angeles, attached to Van Nuys; that he had been in the Police Department 20 years. He was then field supervisor. He had known McCowan for five and a half years. At the time of the happening of the events involved here, in 1964, he knew the general reputation in the community of McCowan for truth and honesty and McCowan's general reputation for those qualities was good. (346)

There was a time in 1964 when Mr. McCowan discussed with him the sale of some diamonds; McCowan showed him the diamonds. He looked at Exhibits 1, 2 and 3, the diamond rings, and he said they appeared to be the same rings as those which McCowan had showed him. (347) He gave McCowan the name of Brooks Runyon whom he thought would be interested in buying the rings. (347)

PATRICK H. LONG testified he was a police officer for the City of Los Angeles, assigned to Van Nuys Detectives; he was a sergeant in 1964 and 1965. He knew Michael McCowan. Sometime in October or September he had a conversation with Officer McCowan in relation to a person by the name of Kenneth Christensen. (350) McCowan told him that he had met Christensen's wife, who was a student, and that she was in love with Christensen and that he felt he was in very close with her and could learn information that might

possibly lead to solving some of the crimes that Christensen was responsible for on the West Coast. McCowan also informed him that Christensen was in custody and that possibly Mr. Christensen's wife was involved in some crimes on the East Coast with Christensen. He told McCowan to stay close to her and keep his eyes and ears open and report to him what happened. McCowan reported to him that Christensen had apparently pulled a job in the East and that Christensen's wife saw him captured by the police and she had driven the car back to the West Coast. Either on this occasion or later McCowan mentioned to him that he had checked the car out - it had been sold to a dealer, and had searched the car for some weapons; that there were supposed to be quite a few guns involved. (352) He had other conversations with Mr. McCowan; he did not remember how many or what dates; the conversations were in relation to these women and Kenneth Christensen, fur coats, jewelry, and guns. McCowan told him that Christensen's wife had jewelry and furs; she had received the property as gifts from her husband. (353) McCowan on one occasion told him the girls had left the fur coats with him, and he told McCowan to give them back before he got into trouble. (354) McCowan at one time gave him an inventory of numbers on weapons or guns. McCowan told him he had taken the serial numbers from the guns. There was a time during

the period in question when Mr. McCowan brought a box to him at Van Nuys Detectives. He thought Officer Miller was present. The box was a half an inch or three quarters thick by three or four by five. (356-357) The box marked Exhibit 4 appeared similar in size. The box was wrapped or partially wrapped; the addressee was Joan Ancell (Ansel), Room 7, Colonial Manor Motel, Rockville, Maryland. (358) There was a sender's Post Office Box 2754, Van Nuys. (358-359) In the box there was an address book which had a list of 24 notations with amounts of money opposite, the smallest amount being \$60 and the largest \$16,500. (359-360) Also in the box there was an Armed Forces ID card in the name of Michael Y. Ancell(Ansel); there was a pilot's license, Federal Aviation Agency; temporary Airman's Certificate; a California driver's license; a previous driver's license in Texas; a USA Federal Aviation Agency medical certificate; personal ID card, printed type - all of these under the name of Michael Yosef Ancell (Ansel). There was also a card for the Airways Rent-A-Car System, an aircraft support equipment license, a Hertz Rent-A-Car charge card, Motor Insurance Corporation ID card, a Federal Communication Commission restricted radio-telephone operator's permit, a discount card for Union Furniture Company, and a small ID card for a Cad convertible. (363) After examining this material he gave it back to Mr. McCowan and told him to

send it to the addressee. (365-366) He had known McCowan for six years; knew people who knew McCowan; and knew that McCowan's general reputation in the community for truth and honesty was good. (366)

PAT KEALY testified that he was a police officer of the Los Angeles Police, a sergeant, and had been a police officer for 20 years; that he knew Mr. McCowan; that he had worked with McCowan; that he knew people in the community who knew McCowan and in 1964, at or about the time of the events here, McCowan's general reputation for truth and honesty was good. (371-372)

GEORGE E. O'NAN testified that he was a police officer of the City of Los Angeles and had been for 17 years. He had known McCowan for several years. He knew McCowan's general reputation for honesty and truth in the community in which he lived and did business, and McCowan's general reputation for those qualities was good. In 1964 Mr. McCowan showed him some diamond rings. He examined Exhibits 1, 2 and 3; he believed they were the rings. They had been shown to him in the Van Nuys Police Station. (373-374) McCowan said that he wanted to sell the rings.

REBUTTAL WITNESSES:

STANLEY H. JENSEN testified that when he had a conversation with McCowan on January 6, 1965, he asked McCowan a question about diamond rings; McCowan did not tell him at that time that he wanted to see counsel. He had a recording which was marked Exhibit 9 for identification. (380-381)

J. P. KEOWN testified that he had authority in a case such as this to render a lie detector test. (382-383) When McCowan asked him if he (McCowan) could take a lie detector test, he told McCowan that they generally did not give a lie detector test in cases such as this where the subject had already lied to them. That was all he said.

On cross-examination he stated that Mr. McCowan offered to take a lie detector test and he (the witness) refused. (385)

FOR THE DEFENDANT-APPELLANT:

OLIVE STARKWEATHER testified that she was an attorney. She knew Mr. McCowan. She knew people who knew McCowan. She knew McCowan's general reputation in 1964 for the qualities of truth and honesty and his general reputation for those qualities in the community was good. (413-414)

GERARD VACCARO was recalled. He identified Exhibit C, a tape recording of a conversation between himself, Jean Ortiz and Joan Ansel. He had been trying to get a statement to assist in the case. The statements were freely and voluntarily made. (415-417)

DEFENSE CLOSED.

GOVERNMENT CLOSED.

The defendant-appellant moved for a judgment of acquittal as to both counts. Under Rule 29, the court reserved its ruling on the motion. (420)

ARGUMENT

I

THE COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN THE TRIAL JUDGMENT ON BOTH COUNTS OR EITHER COUNT.

ANCILLARY TO THIS, AND CONTROLLING, WE RESPECTFULLY URGE THAT THE COURT HAD NO JURISDICTION TO TRY THIS CASE. McCOWAN WAS A SENDER, AND WHEN THE PACKAGE WAS RETURNED TO HIM THE POSTAL AUTHORITIES AND THE UNITED STATES DISTRICT COURT LOST JURISDICTION TO TRY McCOWAN.

It is our contention that the package was surrendered by the postal authorities to the writer or its rightful agent; that upon such delivery, "then the authority and power over the [package] of the United States ceases and determines." (*United States v. Bullington, supra*, 170 Fed. Rptr. 121.)

"Any delivery to the writer before its conveyance by the mail ends the authority of the government over it; and the delivery of it to the rightful agent of the writer would be the same as a delivery to the writer himself. The same rule applies, and the principle is the same, when it is delivered to the addressee or his agent."

United States v. Bullington, supra,
170 Fed. Rptr. 121, 123.

We have carefully reviewed the cases, in the hope we could find something recent to help us, but without avail. We respectfully direct the Court's attention to *Bullington*,

supra, and to *United States v. Safford*, 66 Fed. Rptr. 942.

In the latter case, the Court said:

"The courts all agree that such an interpretation should not be given to this statute, and this is obviously correct. Several considerations lead unerringly to such a conclusion. Congress only intended to secure the sanctity of the mail while it was in the custody of the postal department en route from the sender to the person to whom it was directed. Beyond the protection of the mail while discharging the functions of postal service with respect to it the federal government has no rightful power or legal concern. Its right to impose any penalties is an incident to its power to establish post offices and post roads, and in the discharge of this function to protect the correspondence from the depredations of its own employes, as well as the unlawful aggressions of others. It would be reprehensible to assume that congress made a pretext of this power to establish rules of good conduct and punish violations of them between a principal and agent or to promulgate police regulations independent of the postal service, and after the postal functions had been performed. Such matters are of local concern, amenable to state law. It is but just that one who, having been delegated by another to receive his mail, and, having received it, should embezzle it, should be punished; and it is likewise just that one who should steal a letter after it had been delivered, and before it came into the manual possession of the party to whom it was directed, should be punished; but we should not allow our anxiety to suppress immoralities and

punish crime to cause us to ignore the proper tribunals and proper authority for the redress of grievances of this character. So a statute, broad in its terms, will be restricted by construction to the objects which the legislature had in view, and especially will its terms be restricted within the organic authority of the enacting body. *Farmun v. Blackstone Canal Co.*, 1 Sumn. 46, Fed. Cas. No. 4,675; *Sage v. City of Brooklyn*, 89 N.Y. 189; *People v. McClave*, 99 N.Y. 83, 1 N.E. 235; *Suth. St. Const.* §§ 246, 324. Speaking with respect of the construction of this statute, Judge Betts, with whom was sitting Judge Nelson, in *U.S. v. Parsons*, 2 Blatchf. 104, 106 Fed. Cas. No. 16,000, said:

"What, then, is the true import and force of the phrase, 'shall have been in a post office or in the custody of a mail carrier,' and of the phrase, 'before it shall have been delivered to the person to whom it is directed'? Are they of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail under the power and control of the federal government, in every change and transfer from person to person and place to place, and without limitation of time. Legislation of such a scope and extent would clearly not be in furtherance of the functions and duties of the post-office department, but in protection of the private property of individuals after it had become detached from that department and was wholly out of the charge of its agents. Such legislation would thus necessarily take quality and form of a municipal regulation governing the relations and responsibilities of individuals to each other in respect to letters and their contents which had been in the post office, although not obtained through any act of fraud or deceit against

the post-office laws. And congress would, in effect, be invested with the power to compel every person into whose possession a letter which had been in the post office should come to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed. We think that the object of this twenty-second section does not look beyond a possession of letters obtained wrongfully from the post office or from a letter carrier. Its design is to guard the post office and its legitimate agents in the execution of their duties in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the post office or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law, and not of that of the United States.'"

United States v. Safford, supra,
66 Fed. Rptr. 942, 943-944,

citing:

United States v. Parsons,
2 Blatchf. 104, 106
Fed. Cas.No. 16,000.

See also:

United States v. Driscoll,
1 Lowell, 303, Fed. Cas.
No. 14,994,

cited in *United States v. Safford, supra.*

II

THE UNITED STATES ATTORNEY WAS GUILTY OF MISCONDUCT IN THE COURSE OF CROSS-EXAMINATION OF A CHARACTER WITNESS OF DEFENDANT-APPELLANT - SUCH AS COULD NOT BE CURED BY AN INSTRUCTION TO DISREGARD THE SAME, AS GIVEN BY THE COURT.

Mr. Ira Reiner, Deputy City Attorney of Los Angeles, testified on behalf of defendant-appellant McCowan and, among other things, stated that he knew McCowan's reputation for truth and honesty in the community in which he resided and did business and that his reputation for those qualities was excellent (R.T. p. 300). On cross-examination, the Assistant United States Attorney asked:

"Have you heard that Mr. McCowan passed worthless checks in the sum of \$12,568.00, and that as a result of this it was a major factor in a man losing his business?" (R.T. p. 301)

Objection was immediately made (R.T. p. 301). Thereupon there was discussion between court and counsel, some of it beyond the hearing of the jury, at the side bar (R.T. pp. 302-305). The court then instructed the jury to disregard the question asked by counsel (R.T. pp. 305-306):

"THE COURT: Ladies and gentlemen of the jury, when the court makes a ruling on a matter you are not to speculate as to why the court has made the ruling, nor what might have been offered if the court had not made a

ruling.

"In the trial of a case -- and in particular a criminal case -- the court should try to see to it that the issues are made as simple as possible so that the jury, when it has the case to decide on guilt or innocence, should be able to decide without confusion and without collateral issues. And if we get off into the trial of collateral issues it sometimes has a tendency to confuse the jury.

"For that reason I am taking my prerogative at this time and not allowing the testimony which was offered. And you are to disregard the question asked by counsel, to give it no -- give it no consideration whatsoever. It is not to be considered by you in determining this case. Just try to, as near as you can, make it so that you never heard that statement. You must not consider that question and the attempted answer."

With the next witness, the Assistant United States Attorney was about to pursue the same question and asked the court if he was precluded from so doing (R.T. pp. 309-310):

"MR. MILLER: Am I to understand that I am to be precluded from going into this area that we discussed before as to all these character witnesses they are going to put on?

"THE COURT: I don't know how much plainer I could have made it. I don't know how much plainer I could have made it, if I had written it out and put it on the wall it couldn't have been plainer.

I don't know how you could ask that question.

"MR. PARSONS: I ask the court, please, to instruct the jury to disregard that.

"THE COURT: All right. I was trying to divert the jury's attention away from that entirely, and the jury again is instructed to completely disregard the question and any reference to that matter, they are not to consider it at all in considering the guilt or innocence of this defendant in this case.

"I made a ruling and the ruling stands, as to that witness, and as to all witnesses that are called at a later time -- no matter who they may be."

We contend that this was in violation of the rule laid down in *Vierick v. United States*, 318 U.S. 236, 248, quoting *Berger v. United States*, 295 U.S. 78, 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he

is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

With all due respect to the learned trial judge, the instruction to the jury to disregard could not, and apparently did not, overcome the prejudicial effects of the question.

As was said in *Krulewitch v. United States*, 336 U.S.

440:

" . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. (Citing cases)"

III

INCIDENTS WHICH DENIED DEFENDANT- APPELLANT A FAIR TRIAL, AS GUARANTEED BY THE CONSTITUTION:

- A. THE NEW INDICTMENT AFTER THE MISTRIAL,
SWITCHING THE ALLEGATIONS, AND
DOING SO TO ENCOMPASS THE TESTI-
MONY DEVELOPED IN THE FIRST TRIAL.

(See Motion to Dismiss - Clerk's
Transcript.)

- B. THE QUESTION PUT TO ONE CHARACTER
WITNESS AND SOUGHT TO BE PRESENTED
TO THE NUMEROUS CHARACTER WITNESSES.

- C. THE QUESTIONS PUT TO THE DEFENDANT
ABOUT HIS LEGAL EDUCATION.
- D. THE QUESTIONS ABOUT DEFENDANT-
APPELLANT'S INTIMACY WITH THE
GOVERNMENT'S FEMALE WITNESS.

WHAT IS A FAIR TRIAL?

It has been said in a discussion of that fair trial
which is guaranteed by the Constitution:

"The bars which guard the right
to a fair trial, such as is guaranteed
by our Constitution, include court pro-
cedure, rules of evidence and proper
instructions to the jury. These bars
must not be lowered. To do so is to
strike at the very foundation of our
system of jurisprudence which has for
its ultimate goal the preservation and
protection of the representation and
freedom of the individual citizen."

Miller v. United States,
120 F. 2d 968, 973.

CONCLUSION

We respectfully urge that the evidence was not sufficient to sustain the trial judgment on both counts or either count and, if a crime was committed, the trial court did not have jurisdiction; that the sum total of the evidence, the errors to which we have directed the Court's attention, and the incidents which occurred, resulted in an unfair trial, such as is guaranteed by the Constitution; and that by reason thereof, the judgment should be reversed.

Respectfully submitted,

RUSSELL E. PARSONS and
RICHARD CHRISTENSEN

BY RUSSELL E. PARSONS

Attorneys for Appellant

C E R T I F I C A T E

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

DATED: October 11, 1966, at Los Angeles, California.

RUSSELL E. PARSONS
Signature of Counsel

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on October , 1966, I served the within APPELLANT'S OPENING BRIEF (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October , 1966, at Los Angeles, California.

D. A. Standefer

Orig & 20 copies:

Clerk, U.S.Court of Appeals for the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101

1 copy:

Honorable Charles H. Carr
U. S. District Court, Southern District of Calif.,
Central Division, Los Angeles, California

Subscribed and sworn to before me

this day of October , 1966.

Notary Public in and for
the State of California.

N O. 2 0 9 1 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ALLAN McCOWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

JAN 4 1967

WM B LUCK CLERK

FEB 15 1967

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IN THE UNITED STATES COURT OF APPEALS
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MICHAEL ALLAN McCOWAN,

Appellant,

vs.

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

Appellant Michael Allan McCowan appeals from his conviction upon a two count indictment charging him with violations of Title 18, United States Code, Section 1702 (Obstruction of Correspondence), and Section 1708 of Title 18, United States Code (Theft of Mail).

Count One of this indictment charges appellant with having obtained by fraud and deception from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland. Count Two charges that

appellant opened the above-addressed package which had theretofore been in the Van Nuys, California Main Post Office before it had been delivered to the addressee with design to obstruct correspondence. Both offenses are alleged to have occurred on October 21, 1964

[R. T. p. 2]. ^{1/}

That indictment which was filed on June 9, 1965 [C. T. p. 2] ^{2/} will hereinafter be referred to as the second or superseding indictment which was filed in Criminal Case No. 35009-CD.

Prior to the filing of the second indictment, the grand jury had, on January 27, 1965, returned an indictment in criminal case No. 34508-CD, hereinafter referred to as the first indictment [C. T. p. 72], charging appellant in a two count indictment with having violated Title 18, United States Code, Section 1708. Jury trial on that indictment commenced before the Honorable Jesse W. Curtis. On April 9, 1965, Judge Curtis declared a mistrial for the reason that the jury was unable to agree upon a verdict [C. T. p. 74].

Subsequent to the mistrial in connection with the first indictment, the grand jury returned the second indictment.

On November 13, 1965, a jury trial commenced on the second indictment, before the Honorable Charles H. Carr. A verdict of guilty as to both counts was returned by the jury on November 17, 1965 [C. T. p. 81].

On January 24, 1966, Judge Carr sentenced appellant to

^{1/} R. T. refers to Reporter's Transcript.

^{2/} C. T. refers to Clerk's Transcript.

five years imprisonment on each of the counts of the indictment, the sentences to begin and run concurrently, and for a study as described in Title 18, United States Code, Sections 4208(b) and (c) [C. T. p. 63].

The United States District Court for the Southern District of California had jurisdiction of this case based upon Title 18, United States Code, Sections 1702, 1708 and 3231. The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1702 provides:

"Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

Section 1708 of Title 18, United States Code provides in pertinent part:

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Was there sufficient evidence to support the judgment of conviction below and to warrant the Court's denial of appellant's Motion for Judgment of Acquittal?
2. Do the provisions of Title 18, United States Code, Sections 1702 and 1708 extend to the facts of this case?
3. Was Government counsel guilty of prejudicial

misconduct during cross-examination of certain defense witnesses?

4. Were appellant's Constitutional rights violated by reason of a conviction after a jury verdict of guilty based upon a superseding indictment which included modified counts similar to those contained in a prior indictment which resulted in a mistrial after the jury was unable to agree?

B. Statement of Facts

Appellant McCowan, a former officer for the Los Angeles Police Department [R. T. 190] met two sisters, Jean Ortiz and Joan Ansel at the Woodley Inn, a restaurant located in Los Angeles County, California, in about September, 1964 [R. T. p. 24].

Appellant began to date Ortiz, and the two were seeing each other almost daily for some time, usually at Ortiz's apartment [R. T. pp. 26-27].

In early October, 1964, Joan Ansel left California. Prior to leaving, she left three diamond rings (Government's Exhibits 1, 2 and 3) in the possession of appellant [R. T. p. 27]. Thereafter, Ortiz received a telephone call from Ansel, and as a result of that call, Ortiz asked appellant to return the rings to her so that she could send them to Ansel. Appellant took the rings to Jean Ortiz's apartment [R. T. p. 28]. At the time Mr. McCowan returned the rings to Ortiz, both she and appellant wrapped the rings in a black box (Government's Exhibit 4) [R. T. pp. 29-30].

Appellant placed the rings in Government's Exhibit 4 [R. T.

p. 30]. After the package was wrapped, both Mr. McCowan and Ortiz went to the Van Nuys, California Police Station where appellant worked [R. T. p. 31]. Mr. McCowan entered the station, and thereafter returned to tape and place string around Government's Exhibit 4. Appellant insisted on addressing the packages [R. T. p. 31]. Mr. McCowan addressed the package to Joan Ansel in Maryland, but placed his name on it as sender and listed the return address as Post Office Box 2754, which post office box was shared by Ortiz and Ansel. Appellant explained to Ortiz that his having written "McCowan" on Government's Exhibit 4 was accidental [R. T. pp. 31-32].

Appellant and Ortiz then drove in Ortiz's automobile to the Van Nuys Boulevard Post Office Substation. When they arrived there, Mr. McCowan stated that it would be better if the package was mailed at the Main Branch where it would be better handled [R. T. p. 33]. Ortiz then drove appellant to the Main Post Office on Sylvan Street [R. T. pp. 32-33]. Mr. McCowan and Ortiz entered the Main Post Office and Ortiz handed the package containing the rings to the postal clerk [R. T. p. 34]. Appellant and Ortiz then left the post office and drove back to Ortiz's apartment. Shortly thereafter, appellant stated to Ortiz that he had to leave for work, and he departed [R. T. p. 35].

Some time later, Ortiz had a telephone conversation with her sister, and as a result thereof, she filed an inquiry (Government's Exhibit 5) with the Post Office Department on November 17, 1964 [R. T. pp. 37-38].

Before filing that inquiry, Ortiz had a conversation with appellant at which time Mr. McCowan stated that the package containing the rings had probably, because of its size, been lost in the mail [R. T. pp. 39-40].

Ortiz never authorized appellant to take Government's Exhibit 4 from the mail, and, in fact, never had any conversation with appellant with reference to his extracting the package from the mail [R. T. p. 39].

On October 20, 1964, the day before Government's Exhibit 4 was mailed, appellant, dressed in police uniform, entered the Van Nuys, California Post Office and inquired of postal clerk Edward Tully how a package might be withdrawn from the mail. Mr. McCowan stated to Tully that he was working under cover on a case [R. T. p. 91], and that when he returned to the post office, Tully should act as though he did not know appellant [R. T. p. 93]. Tully referred appellant to Assistant Postmaster Garth Gledhill [R. T. p. 91].

Mr. Gledhill also spoke to appellant on October 20th [R. T. p. 98]. Mr. McCowan stated to Gledhill that he was working with the Narcotics Branch of the Police Department and that he believed that two young girls "that he had worked himself in with" were planning to mail a package which it was believed contained narcotics, and he desired to withdraw the package for further investigation [R. T. p. 99]. Mr. McCowan asked if there was a procedure whereby he could withdraw a package from the mail. Mr. Gledhill advised appellant that a package could be withdrawn if proper

identification be shown together with the filing of an appropriate post office form. Appellant further stated to Gledhill that in the near future the package would be mailed, and that he would contact the postmaster as quickly as possible with regard to withdrawing it [R. T. p. 99].

On the following day, October 21, 1964, between 10:30 and noon, appellant returned to the post office with Jean Ortiz, and Ortiz handed Tully a package which was placed in the United States mails [R. T. pp. 34, 92]. Later, that same morning, Mr. Gledhill received a telephone call from appellant at which time Mr. McCowan stated that the package had recently been mailed. Appellant furnished certain information to Gledhill, including his address, and the name of the addressee, Joan Ansel, Colonial Manor Motel, Rockville, Maryland [R. T. pp. 99-100]. Thereafter, Gledhill approached Postal Clerk Tully and obtained the package from him [R. T. p. 101].

Gledhill then prepared Post Office Department Form 1509 - (Sender's Application for Recall of Mail - Government's Exhibit 6), changing appellant's address related to Gledhill by McCowan from a Granada Hills address to Post Office Box 2754 [R. T. pp. 101-102].

Thereafter, appellant again entered the post office, signed Form 1509 and took possession of the package, explaining that he had placed Jean Ortiz's post office box number on the package in error [R. T. p. 103].

Sometime in November, 1964, appellant requested that

John Brayman, a salesman for a Los Angeles jeweler, M. Weinstein, Inc. [R. T. p. 100] appraise three diamond rings (Government Exhibits 1, 2 and 3) [R. T. p. 111]. Appellant stated that he had received the rings from relatives back east and that they were his [R. T. p. 110]. The rings were appraised, and appellant received an appraisal blank (Government's Exhibit 7) from Mr. Brayman [R. T. p. 112].

Approximately three weeks before Christmas, 1964, appellant asked John Brooks Runyan, a paraplegic residing in Sherman Oaks, California [R. T. pp. 116-117] if he would be interested in buying or selling the diamond rings (Government's Exhibits 1, 2, 3) [R. T. pp. 117-118]. Appellant stated to Runyan the he had acquired the rings in a real estate deal [R. T. p. 118], and that he needed money for the reason that he would be away from his employment while preparing for the bar examination [R. T. p. 134]. Appellant displayed to Runyan the appraisal form he had previously received from Mr. Brayman [R. T. p. 121].

In mid-December, Runyan turned over the rings and box containing them to Charles Matheny, a Canoga Park, California jeweler [R. T. p. 140] to have them appraised [R. T. p. 141], the Friday before Christmas [R. T. p. 146]. Matheny sold one of the rings (Government's Exhibit 1) to a customer, William H. Tanzey for \$1,100 [R. T. pp. 142-143]. That sum was turned over to Runyan [R. T. p. 143] who gave the money to McCowan [R. T. p. 125]. Jean Ortiz received no part of this money [R. T. p. 44].

Appellant McCowan was interviewed by Postal Inspectors

on January 6, 1965 [R. T. p. 152]. During the interview, McCowan claimed that the package taken from the mail contained identification cards - not diamond rings [R. T. p. 158]. At first appellant claimed that he had remailed the identification cards [R. T. p. 158]. Later in the interview, Mr. McCowan stated that perhaps he had not remailed the package, and that he still might have it. Finally, appellant stated that he had thrown away the package containing the identification [R. T. p. 158].

After his arrest, Mr. McCowan stated to Jean Ortiz that he was sorry for having taken the rings and that his purpose was to sell them and give her the money for them [R. T. p. 42]. Mr. McCowan also requested that Ortiz plead the Fifth Amendment in Court [R. T. p. 43].

At the conclusion of the Government's case, appellant took the stand and testified that after having met Joan Ansel and Jean Ortiz [R. T. p. 191] he and Ansel brought the diamond rings, along with other property belonging to Ansel, to a home on Royal Oak Boulevard in Sherman Oaks, California, which appellant had been watching for the owner [R. T. p. 201]. Appellant testified that he removed the diamond rings from the Royal Oak residence to his home, and in so doing, his wife assisted him [R. T. p. 210]. Sometime thereafter, Joan Ansel stated that she was leaving California, and that he did not see her again [R. T. 210].

Shortly thereafter, Jean Ortiz told appellant that Ansel called her and wanted the rings sent to her, and that Ortiz asked appellant to assist her in wrapping the rings [R. T. p. 214].

Mr. McCowan testified that he returned the diamond rings to Ortiz [R. T. p. 216], and that he and Ortiz prepared two packages for mailing: a package containing the diamond rings as well as another package which was approximately the same size as the package containing the diamond rings. Appellant stated that the rings were in a little black box (Government's Exhibit 4) [R. T. p. 217]. Appellant further claims that he placed his name on both packages [R. T. pp. 275-276].

Appellant testified that on October 21st, Ortiz requested that he sell the three diamond rings (Government's Exhibits 1-3). At that time, appellant contended that the box containing the diamond rings was given to him by Ortiz, with her authority to sell the rings and that this box was not mailed [R. T. pp. 218-219].

McCowan contended that he and Ortiz mailed a package, the contents of which he did not know at the time of mailing [R. T. p. 222]. Later appellant returned to the post office and retrieved the mailed package from Gledhill [R. T. pp. 222-223].

After the package was obtained from the post office, appellant stated that he took it to the police station and that he placed the package in his locker and it was not until the following morning that it was taken to the Detective Squad Room [R. T. p. 224]. According to appellant, the package had not been opened when it was brought to the Detectives on October 22, 1964 [R. T. 225].

When the package was opened in the Detective Room, and it was discovered that the package contained identification cards, Sergeant Long advised appellant to place the package back in the

mail [R. T. pp. 225-226]. Appellant admits that he did not remail the package containing the identification but destroyed it so that it could not be used in a jail break [R. T. p. 287].

Appellant testified that he had been relaying information concerning the activities of Ansel and Ortiz to officers of the Los Angeles Police Department [R. T. pp. 194-195, 207]. He admitted that at the time he showed the package containing identification to the police officers, he did not mention the other package containing diamond rings or the fact that he had been given the diamond rings to sell by Ortiz [R. T. pp. 284-285]. Appellant further admitted making love to Jean Ortiz during the time he was carrying on this police investigation [R. T. pp. 286-287]. Appellant admits that he kept the \$1,100 received by him until the time of his arrest [R. T. p. 293].

Sergeant Patrick Long, a detective for the Los Angeles Police Department, testified that appellant had supplied information which appellant said he thought could lead to the solution of crimes on the West Coast. This information related to Joan Ansel and her husband [R. T. pp. 351, 352]. Long further testified that he told appellant to keep him advised of developments [R. T. p. 352].

Sergeant Long further testified that appellant had brought a box which contained identification to his attention [R. T. pp. 356, 360]. Sergeant Long made notes from the wrapper on this package [R. T. p. 358]. No notation was made of McCowan's name on the wrapper, and if it had appeared on the wrapper, Sergeant Long thought it would have been recorded [R. T. p. 369]. He recalled

no postage stamps on the package [R. T. 368]. Mr. McCowan never told Sergeant Long that he had possession of the diamond rings [R. T. p. 368].

Ten witnesses were called by the defense to testify to the good character of Mr. McCowan regarding truth and honesty: Ira Reiner [R. T. 300], Gerard Vaccaro [R. T. p. 310], Rosemarie Gruenwald [R. T. pp. 312, 313], Earl Osadchey [R. T. p. 335], David Victor Stanton [R. T. p. 337], John E. O'Grady [R. T. p. 346], Patrick H. Long [R. T. p. 366], Pat Kealy [R. T. p. 372], George E. O'Nan [R. T. p. 373], Olive Starkweather [R. T. p. 414].

IV

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JUDGMENT OF CONVICTION BELOW. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The Ninth Circuit stated the rule which governs the granting of a motion for a judgment of acquittal in Las Vegas Merchant Assn. v. United States, 210 F.2d 732 (9th Cir. 1954). The court there stated at page 742:

"The verdict of a jury will be sustained if there is any substantial evidence in the record to support it. In determining whether the evidence is sufficient to support the verdict, we must consider the evidence in the light most favorable to the Government. Glasser v. United States, 1942, 315 U.S. 60, 69, 62 S.Ct. 457, 86 L.Ed. 680; Woodward Laboratories, Inc. v. United States, 9 Cir. 1952, 198 F.2d 995."

In Schoppel v. United States, 270 F.2d 413 (4th Cir. 1959), at pp. 415, 416, the court said:

"We are unable to agree that the Government's evidence was so lacking in weight and substance as to require a directed verdict of acquittal. Assuming

that the guilt of the appellant was arguable, it was for the jury, not the Judge, to resolve the question. This Court has had occasions several times to point out the respective roles of judge and jury in such a situation. Even when in the judge's opinion it is possible for the jury not to be convinced of guilt beyond a reasonable doubt, this does not justify withdrawing the case from the jury's consideration.
. . . "

See also:

Remmer v. United States, 205 F.2d 277

(9th Cir. 1953);

Cape v. United States, 283 F.2d 430

(9th Cir. 1960);

Bolen v. United States, 303 F.2d 870

(9th Cir. 1962).

When the above principles are applied to the facts of this case, we find that the following competent evidence was presented at trial:

Appellant, a former policeman, met Jean Ortiz and Joan Ansel in September, 1964 [R. T. p. 24]. He began to date Ortiz and see her almost daily at her apartment [R. T. pp. 26-27].

Prior to leaving California in October, 1964, Joan Ansel had left the three diamond rings in question with appellant [R. T. p. 27].

Thereafter, Mr. McCowan was asked to return the rings to Ortiz so that they could be mailed to Ansel [R. T. p. 28]. Appellant returned the rings and assisted Ortiz in wrapping them in the black box (Government's Exhibit 4) [R. T. pp. 29-33].

Appellant insisted on addressing the package, and in so doing, addressed it to Joan Ansel in Maryland, but placed his name on it as sender explaining to Ortiz that this had been accidental [R. T. pp. 31-32].

Appellant accompanied Ortiz to the main post office on Sylvan Street in Van Nuys, California, where Ortiz handed the package to the postal clerk [R. T. pp. 32-34].

As a result of a telephone conversation with her sister sometime later, Ortiz filed an inquiry with the Post Office Department on November 17, 1964 [R. T. pp. 37-38]. After filing the inquiry, Ortiz spoke to Mr. McCowan, who stated that the package containing the rings had probably been lost in the mail [R. T. pp. 39-40].

On October 20, 1964, the day before the package was mailed, appellant, who was in police uniform, inquired of a postal clerk at the above-mentioned post office as to how a package might be withdrawn [R. T. p. 91]. Mr. McCowan stated to the Assistant Postmaster that he was with the Narcotics Branch of the Police Department and that he believed two young girls were planning to mail narcotics [R. T. p. 99]. Mr. McCowan was told that a package could be withdrawn from the mail by demonstrating proper identification and by the filing of an appropriate post office form [R. T.

pp. 98-99].

On the morning of the following day, Mr. Tully recalled that appellant returned to the Post office with Jean Ortiz and that Ortiz handed Tully a package which was mailed [R. T. pp. 34, 92]. On the same morning, Mr. McCowan telephoned Assistant Postmaster Gledhill and advised that the package had been mailed [R. T. pp. 99-100]. Gledhill prepared Post Office Department Form 1509 from information conveyed to him by appellant and from information contained on the package which Mr. Gledhill obtained from Mr. Tully [R. T. pp. 101-102].

Shortly thereafter, appellant came to the post office, signed Form 1509, and took possession of the package, explaining to Gledhill that he had placed Jean Ortiz's post office box number on the package in error [R. T. p. 103].

Jean Ortiz never authorized appellant to take Government's Exhibit 4 from the mail [R. T. p. 39].

Sometime in November, 1964, at appellant's request, John Brayman, a salesman for a Los Angeles jeweler, appraised the three diamond rings in question [R. T. p. 111]. On this occasion, appellant stated that he had received the rings from relatives back east and that they were his [R. T. p. 110].

Approximately three weeks before Christmas, 1964, appellant inquired of John Brooks Runyan as to whether he would be interested in buying or selling the rings [R. T. pp. 117-118]. Appellant stated to Runyan that he had acquired the rings in a real estate deal [R. T. p. 118], and that he needed money while

preparing for the bar examination [R. T. p. 134].

In mid-December, Runyan turned over the rings and box containing them to Charles Matheny, a Canoga Park jeweler [R. T. p. 140] who sold one of the rings to William H. Tanzey for \$1,100. [R. T. pp. 143-144]. That sum was turned over to appellant [R. T. pp. 135, 143]. Jean Ortiz received no part of the money [R. T. p. 44], and appellant admits keeping the money until the time of his arrest [R. T. p. 293].

When interviewed by the postal inspectors in January, 1965, appellant stated that he had taken a package from the mail, but this package contained identification cards - not diamond rings. Mr. McCowan's explanation to the postal inspectors with respect to what was done with the identification cards contradicted itself three times during that interview. Appellant finally stated that he had thrown away the package containing the identification [R. T. p. 158].

Having been arrested, appellant requested Jean Ortiz to plead the Fifth Amendment at trial [R. T. p. 43].

Appellant testified at trial in his own defense. He contended that at the time of mailing, he did not know the contents of the package [R. T. p. 222].

Thereafter, according to appellant, the package was taken by him to the Van Nuys Detective Room, and when it was discovered that the package contained identification, Sergeant Long advised appellant to place the package back in the mail [R. T. pp. 225-226].

The following testimony was elicited from the appellant on

cross-examination with reference to Mr. McCowan's placing his name on Government's Exhibit 4:

"Q. And you wrote your name as sender on Government's Exhibit 4, didn't you?

"A. I believe I did.

"Q. Now, if you knew that that box contained the diamond rings, why would you put your name on as sender?

"A. I put my name on as sender on both packages.

"Q. Yes. Why, if you knew, at the time you wrapped it, that that package contained the diamond rings, why did you put your name on as sender, that box?

"A. On this particular box?

"Q. Yes, sir.

"A. I addressed them both the same.

"THE COURT: Well, he asked you why. Please answer.

"THE WITNESS: Well, I just had been doing everything I just continued to do it. I used my name just --

"Q. BY MR. MILLER: Why?

"A. The only reason that I could give you, Mr. Miller, is that I have been taking over doing these things for these girls all the way and I just

put my name on as sender." [R. T. pp. 275-276].

* * *

"Q. Isn't it a fact that the reason you put your name on that black box is because the day before you had talked to Mr. Gledhill and he told you the only way you could get a box or package out of the mails was that if your name was on it as sender?

"A. No, these packages were wrapped before I talked to Mr. Gledhill, Mr. Miller.

"THE COURT: Not wrapped, but were they addressed and were they marked?

"THE WITNESS: Yes, they were addressed and marked before I talked to Mr. Gledhill.

"THE COURT: You put your name on before you talked to Mr. Gledhill?

"THE WITNESS: Yes, I believe I did.

"THE COURT: Do you remember?

"THE WITNESS: I really don't recall.

"THE COURT: Go ahead.

"Q. BY MR. MILLER: You don't recall when you put your name on that package?

"THE COURT: That is what he said.

"Q. BY MR. MILLER: And you really don't know why you put your name on the package, is that your testimony?

"A. My testimony is what I just testified to.

"THE COURT: No, he is asking you, you really don't know why you put your name on?

"THE WITNESS: No, sir, I don't.

"THE COURT: At this time you can't say why you did it, is that right?

"THE WITNESS: Yes, your honor."

[R. T. pp. 277-278].

During the course of this portion of the cross-examination, it is obvious that appellant realized his mistake in stating that the packages were addressed and marked prior to his discussion with Gledhill, otherwise there would have been no purpose in appellant's having talked to Mr. Gledhill.

In attempting to explain why he did not tell the officers of the Police Department about the fact that there were two packages involved, appellant testified:

"Q. You didn't think that there would be a duty on your part to tell them about the packages containing the diamond rings -- the package containing the diamond rings, and the fact that you were going to try to sell them for this girl?

"A. Duty on my part to tell them that? They had told me to give it back and I had given them back.

"Q. Sir, at the time, after the mailing of the package on the 22nd of October, when you went in to

tell them about the package that had been retrieved from the mail, and you showed them a package with some identification in it, you didn't mention the fact that there were two packages, did you?

"A. There was only one package we were interested in.

"THE COURT: The question was you didn't tell them about the other package?

"THE WITNESS: No, sir. I didn't.

"Q. BY MR. MILLER: Didn't it seem to you important that these officers with whom you were working should know that you were going to try to sell three diamond rings for a girl whose husband you say you helped put in jail?

"A. Well, I didn't know first off if I was going to be able to sell the diamond rings, and secondly, I didn't think it was important because the rings and all the stuff had been checked out, so far as I knew, and it was clear.

"Q. So your testimony is you just didn't think it was important to tell them about the diamond rings, right?

"A. The only thing I was interested in at the time was finding out what was in that package that we didn't know what the contents were." [Exhibit A, R. T. pp. 284-285].

Appellant attempted to explain why he had destroyed the package containing the identification:

"Q. BY MR. MILLER: My question was, I believe, why did you destroy the identification?

"A. I believed that there was to be a jail break and I felt that if they didn't have it they couldn't use it.

"THE COURT: Well, how could they get it if you had it? You didn't have to destroy it?

"THE WITNESS: No, your Honor, I guess I didn't have to destroy it. I just thought that was the best thing to do with it, to destroy it." [Exhibit A, R. T. pp. 286-287].

Mr. McCowan admitted that during this period of time when he was purportedly carrying on a police investigation that he was making love to Jean Ortiz [R. T. p. 292].

Undoubtedly, there was sufficient evidence for the jury to conclude that appellant was guilty beyond all reasonable doubt.

Apparently, Mr. McCowan contends that the Government's witness, Jean Ortiz, was not of good character and that her testimony should not be given great weight. However, the jury had the opportunity to judge the credibility of Ortiz as well as all of the witnesses who testified at trial.

As stated in Schoppel v. United States, supra, at page 416:

" . . . it would offend common sense to insist

on the automatic rejection of the testimony of all available eyewitnesses because they are not men of character. It is better to let the witness be heard and trust the practical sagacity of the jurors who have been made fully aware of their informants' shortcomings." (270 F. 2d at 416).

Judging by the above-mentioned standards, there was substantial evidence whereby the jury could conclude that appellant was guilty beyond a reasonable doubt, and the motion for judgment of acquittal was properly denied.

B. THE PROVISIONS OF 18 U.S.C. SECTIONS 1702 AND 1708 EXTEND TO THE FACTS OF THIS CASE.

It is appellant's contention that Sections 1702 and 1708 of Title 18, U. S. C., do not apply to the facts of this case because it is said that the jurisdiction of the United States ceased with respect to the package which was mailed (See Brief of Appellant, p. 47).

However, it is clear that both Sections 1702 and 1708 do contemplate a violation of those sections based upon the instant facts.

In United States v. Eddy, 1 Bliss 227, 25 F. Cas. 15024 (D. C. Ill. 1858) it was held that when a letter is placed in a post-office, it is within the legal custody of the officer or agents of the Government, and while it so continues, the laws of the United

States operate upon it.

The Court of Appeals for the 8th Circuit had occasion to express a similar view in interpreting Section 1702. The court there said:

"It seems to us, however, that the plain language of the statute discloses a clear intent on the part of Congress to extend federal protection over mail matter from the time it enters the mails until it reaches the addressee or his authorized agent."

Maxwell v. United States (1956), 235 F.2d 930, 932,
cert. den. 352 U.S. 943.

Appellant cites the cases of United States v. Bullington, 170 Fed. 121 (W.D. Alabama, 1908) and United States v. Safford, 66 Fed. 942 (E.D. Missouri 1895), in support of the proposition that Sections 1702 and 1708 are not applicable to this case. In Bullington however, the Postmaster, being the writer and sender of the letter involved, withdrew the letter from the mails, and gave it to the defendant, who secreted or destroyed it instead of sending the letter over to a third party according to the Postmaster's instructions. In Bullington, the defendant became the agent of the Postmaster, after the package had been withdrawn from the mails, and the authority of the Government over the letter ceased with its delivery to the defendant. In Safford, a case dealing with revised Statute 3892, a forerunner of Section 1708, the court simply held that the statute did not extend to the case of a letter stolen from

the desk of the addressee upon which it had been placed by the mail carrier, in the absence of anyone to receive it.

Appellant contends that the package in question was surrendered by the postal authorities "to the writer or his rightful agent" (Brief of Appellant, p. 47). This contention is no doubt made in the hopes that this case will fall within the meaning of the Bullington and Safford doctrines. However, the facts in this case clearly demonstrate that appellant was neither the sender nor the agent for the sender and had indeed obtained the package from the postal authorities by means of fraud and with the intent to obstruct correspondence. Appellant admits that he knew the rings did not belong to him [R. T. p. 271]. It was Jean Ortiz who mailed the package. Appellant did not have authority or permission from her to extract the package from the mail. In fact, it is his contention that his purpose in removing the package from the mail was to investigate a possible narcotics violation on Ortiz's part. It can hardly be said by any stretch of the imagination that he was acting on her behalf or as her agent. Appellant's contention is utterly without merit.

C. GOVERNMENT COUNSEL WAS NOT
GUILTY OF PREJUDICIAL MISCON-
DUCT DURING CROSS EXAMINATION
OF DEFENSE WITNESSES.

It is alleged that the Assistant U. S. Attorney prosecuting this case before the District Court was guilty of prejudicial

misconduct during the cross-examination of certain defense witnesses. Three specifications of misconduct are alleged:

(1) It is contended that a question during cross-examination of a character witness regarding past misconduct of appellant was improper.

(2) During cross-examination of the appellant, the Assistant U. S. Attorney inquired concerning the extent of appellant's legal education.

(3) It is contended Government counsel should not have inquired of appellant concerning his intimate relationship with Jean Ortiz.

We must start with the proposition that a full cross-examination of a witness upon the subjects of his examination in chief is the absolute right of the party against whom he is called.

See: Dixon v. United States, 333 F.2d 348

(5th Cir. 1964);

Quiles v. United States, 344 F.2d 490

(9th Cir. 1965).

During the direct examination of appellant he was asked about his professional education to which he responded that he had graduated from Southern Western University Law School in January 1964 [R. T. pp. 190-191]. On cross-examination, the Government simply asked appellant how many years of law school experience he had [R. T. p. 281]. The court did not permit the witness to answer and instructed the jury to disregard the question completely [R. T. p. 282]. It is submitted that the Government had a right to

inquire further as to the extent of appellant's legal education once raised by his counsel during direct examination.

Appellant contends that the Government did not have the right to question appellant with respect to his relationship with Jean Ortiz. The following transpired during cross-examination of appellant:

"Q. Now, during this period of time in September and October when you say you were carrying on this investigation, you were making love to Jean Ortiz during this period of time, weren't you?

"MR. PARSONS: To which I object as incompetent, irrelevant and immaterial.

"MR. MILLER: Your Honor, I think it goes straight to his credibility.

"MR. PARSONS: What difference would it make? It is incompetent, irrelevant and immaterial.

"MR. MILLER: The whole defense is that there is --

"THE COURT: I have heard enough. I will rule. Just one moment.

"I will let him answer the question 'Yes' or 'No'.

"THE WITNESS: Yes, I was." [R. T. p. 292].

In view of the fact that appellant's defense centered around his contention that he was conducting an official police investigation concerning Jean Ortiz and her relatives, it would seem that there

should be no serious question that the Government on cross-examination should be entitled to inquire into appellant's relationship with this principal Government witness, especially where such questioning would cast light on appellant's credibility.

United States v. Provoo, 215 F.2d 531

(2nd Cir. 1954).

Ira Reiner, together with nine other witnesses, was called on behalf of appellant to testify as to his reputation for truth and honesty in the community [R. T. p. 300]. On cross-examination the Assistant U. S. Attorney inquired of the witness in the following manner:

"Q. Have you heard that Mr. McCowan passed worthless checks in the sum of \$12, 568. 00 and that as a result of this it was a major factor in a man losing his business?" [R. T. p. 301].

Upon objection [R. T. p. 301], the court did not permit the answer to the question [R. T. p. 305]. Again, the jury was instructed to disregard the question and give no consideration whatever to it [R. T. p. 306].

Of course, there was authority for the Assistant U. S. Attorney to ask the aforesaid impeaching question of Mr. Reiner, a character witness. In Michelson v. United States (1948), 355 U.S. 469, the Supreme Court said:

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit

and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat - for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives a defendant the option to show as a fact that his reputation reflects a life and habit compatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

Especially, as here, where the question propounded to the witness was founded on a good faith reliance upon information in possession of the prosecuting attorney [R. T. p. 303], there could be no misconduct on the prosecutor's part.

See: United States v. Haskell, 327 F.2d 281, 284

(2nd Cir. 1964);

Quiles v. United States, supra.

Thereafter, Gerard Vaccaro was called to testify on behalf of appellant and foundation questions with reference to Mr. McCowan's reputation in the community were propounded to him [R. T. p. 309]. At that point, the Assistant U. S. Attorney inquired of the court as follows:

"Am I to understand that I am to be precluded from going into this area that we discussed before as to all these character witnesses they are going to put on?" [R. T. p. 309].

The court then made it clear to the Assistant U. S. Attorney that the ruling respecting Mr. Reiner would apply to all future character witnesses [R. T. p. 309].

It is submitted that Government counsel had a right to inquire of the court with respect to whether a ruling regarding one witness would necessarily be binding as to all future witnesses. It is to be noted that Government counsel in propounding his question to the court referred to matters which were discussed not within the presence of the jury and did not again ask the impeaching question.

D. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY REASON OF A CONVICTION AFTER A JURY VERDICT OF GUILTY BASED UPON A SUPERSEDING INDICTMENT WHICH INCLUDED MODIFIED COUNTS SIMILAR TO THOSE CONTAINED IN A PRIOR INDICTMENT WHICH RESULTED IN A MISTRIAL, THE JURY HAVING BEEN UNABLE TO AGREE.

The first indictment brought under Criminal Case No. 34508-CD and filed January 27, 1965 [C. T. p. 72] included two counts, both brought pursuant to Title 18, United States Code, Section 1708:

"COUNT ONE. On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Hotel, Rockville, Maryland, said package containing 3 diamond rings." (Emphasis added.)

"COUNT TWO. On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A. McCOWAN, unlawfully had in his possession the contents of a package, which had been stolen from the mail, addressed to Joan Ansel,

Colonial Manor Motel, Rockville, Maryland, said package containing 3 diamond rings, and at said time and place defendant well knew said contents of said package had been stolen." (Emphasis added).

Trial on this indictment resulted in a mistrial the jury having been unable to agree upon a verdict [C. T. p. 74].

Thereafter, on June 9, 1965, a second and superseding indictment was filed [C. T. p. 2]. It was upon this indictment that appellant was convicted [C. T. p. 63]. That indictment was in two counts. Count One was brought pursuant to Title 18, United States Code, Section 1708, and Count Two was brought pursuant to Section 1702 of Title 18. That indictment reads as follows:

"COUNT ONE:

"On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland."

"COUNT TWO:

"On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A.

McCOWAN, opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office."

It is to be noted that the second indictment does not allege that the package in question contained three diamond rings. It should be further noted, however, that the Court would not permit the Government to expand its theory of the case, but instructed the jury that it must find that the package containing the rings must have been mailed before appellant could be found guilty. The Government had taken the position at trial that the obstruction and obtaining of any package from the mail with fraud and deception constituted a violation of this statute, appellant's theory of the case having been that there were two packages involved [R. T. pp. 429-430]. Appellant has not shown, and indeed cannot show prejudice to him as a result of having been tried on this superseding indictment.

Appellant, although he does not argue it in his brief, appears to contend that his constitutional rights were violated because he was tried upon a superseding indictment at the second trial which contained different charges from those contained in the first indictment. Appellant relies upon the authorities cited in a motion to dismiss the second indictment [C. T. p. 4].

It is indeed well settled that retrial of an accused after a

mistrial because a jury was unable to agree is not a denial of the constitutional right against double jeopardy.

United States v. Perez, 9 Wheat. 578 (1824);

Downum v. United States, 372 U.S. 734, 735 (1963);

Forsberg v. United States, 351 F.2d 242

(9th Cir. 1965).

Appellant has not cited any authority which contradicts the basic principle that retrial is not violative of an individual's Constitutional rights after a first trial which resulted in a mistrial when the jury failed to agree. The authorities cited in appellant's brief and discussed hereinbelow do not support his contention that under the circumstances here, trial on the second indictment, although it contained essentially the same charge in a somewhat different form than the first indictment, violated his Constitutional rights.

The very case relied on by appellant shows that his double jeopardy contention is invalid. Thus Green v. United States, 355 U.S. 184 (1957) states:

"[J]eopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' "

355 U.S. at 188. (Emphasis added).

This has been the law since at least 1824. In that year the

Supreme Court held that a mistrial resulting from a jury's failure to reach a verdict was no bar to a subsequent trial. United States v. Ball, 163 U.S. 662 (1895). In Ball, two of the defendants had been convicted of murder. The Supreme Court reversed their conviction on the ground that the indictment was invalid and remanded the case with directions to quash the indictment. As in the case at bar a new indictment was then returned. The defendants were again convicted. On appeal, the court flatly rejected their contention that they had been twice placed in jeopardy, stating:

"[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." 163 U.S. at 672.

(Emphasis added).

In Hopt v. Utah, 104 U.S. 631 (1881), 110 U.S. 574 (1884), 114 U.S. 488 (1885), 120 U.S. 430 (1887), the defendant was in fact retried three times following reversals of his convictions for murder. The fourth conviction was finally affirmed by the Court. 120 U.S. 430 (1887).

Green v. United States, supra, in no way supports appellant's present contention. Green was originally indicted both for first degree murder and for second degree murder. The jury found him guilty of second degree murder but its verdict was silent on the charge of first degree murder. The conviction of second degree murder was reversed on appeal. On remand, Green was retried

and convicted for first degree murder under the original indictment. The Supreme Court reversed, holding that the first jury's silence was an implicit acquittal on the charge of first degree murder and he therefore could not be retried on that charge. 355 U. S. at 190-91. In reversing the conviction, the court, as noted above, expressly stated that a person can be retried when a jury has been unable to reach a verdict. 355 U. S. at 188. Thus, appellant's motion is completely devoid of authority to support his position.

Appellant also appears to contend that the Grand Jury cannot amend its first indictment by returning a superseding one. Again, appellant's motion is lacking in authority to support this proposition. Resubmission to the Grand Jury is the accepted - indeed, the only - method by which an indictment can be amended. As stated by the Ninth Circuit in Carney v. United States, 163 F.2d 784, 789 (9th Cir.), cert. den. 332 U. S. 824 (1947):

"[T]he rule is that no authority exists to amend any part of the body of an indictment without reassembling the grand jury. . . ."

This has been the law since at least 1887, when the Supreme Court held that the grand jury must be reassembled in order to amend an indictment. Ex parte Bain, 121 U. S. 1, 8, 12-13 (1887).

In United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), reversed on other grounds, 319 U. S. 503 (1943), defendants contended, inter alia, that the indictment was invalid because the grand jury had returned an earlier indictment charging some of the same offenses. Defendants argued that once the grand jury had returned

the first indictment its investigatory powers were at an end and it was unauthorized to return the superseding indictment. The court rejected the contention, stating:

"We see no reason why a Grand Jury is precluded from continuing an investigation after the return of an indictment, and subsequently again indict for the same offense." 123 F. 2d at 119.

Appellant also appears to contend that the indictment should have been dismissed because he testified at the first trial and this testimony may have been used against him at the second trial. Passing the point that even assuming defendant's contention is correct, his remedy was to move to exclude the testimony at trial, we note that defendant's motion cites no authority to support this contention. On the contrary, the authorities appear unanimous that prior testimony of an accused may be used at a subsequent trial. As Judge Mathes stated while discussing this point in United States v. Yates, 107 F. Supp. 408, 411 (S. D. Cal. 1952), reversed on other grounds, 227 F. 2d 844 (9th Cir. 1955):

"On the other hand, if defendant Yates should not elect again to take the stand, her entire testimony at the first trial might then be read to the jury by the plaintiff, either as admissions by the defendant, 2 Wharton, Criminal Evidence §679 (11th ed. 1935); see Jackson v. State, 1925, 29 Okl. Cr. 429, 234 P. 228, 229; West v. State, 1922, 24 Ariz. 237,

208 P. 412, 416; *People v. Thourwald*, 1920, 46 Cal. App. 261, 189 P. 124, 126-127; *State v. King*, 1917, 102 Kans. 155, 169 P. 557, 558; or under the reported-testimony exception to the hearsay rule. See *Mattox v. United States*, 1895, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409; *Smith v. United States*, 4 Cir. 1939, 106 F.2d 726, 728; American Law Institute, *Model Code of Evidence*, Rule 511 (1942).

"The defendant's testimony at the first trial being voluntarily given, no claim of privilege against self-incrimination as to such reported testimony could be raised. *Caminetti v. United States*, 1917, 242 U.S. 470, 493-495, 37 S.Ct. 192, 61 L.Ed. 442; *United States v. Gates*, *supra*, 176 F.2d at page 79; see *Johnson v. United States*, 1943, 318 U.S. 189, 196, 63 S.Ct. 549, 87 L.Ed. 704; cf. *Raffel v. United States*, 1926, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054." 107 F. Supp. at 411.

Dean Wigmore is in accord with Judge Mathes. 8 Wigmore, Evidence Section 2276, pp. 472-73 (McNaughton rev. ed. 1961). See also United States v. Grunewald, 164 F. Supp. 644 (S.D. N.Y. 1958); Warde v. United States, 158 F.2d 651 (D.C. Cir. 1946); Milton v. United States, 110 F.2d 556, 559-60 (D.C. Cir. 1940).

In Kaplan v. United States, 7 F.2d 594 (2nd Cir. 1925), testimony by two of the defendants at a bankruptcy proceeding was

admitted against them in their criminal trial. Judge Learned Hand disposed of their contention that this was error with his usual succinctness and clarity:

"[T]heir admissions were competent against them upon the trial of an indictment, as in a civil cause. Had they wished to remain mute, no doubt they might have done so; but, having once consented to speak, any privilege was at an end. We think it unnecessary to elaborate so plain a point." 7 F. 2d at 597.

McCowan's position is as little supported by reason as by the authorities.

Only one further point need be added. Mr. McCowan appears to cite Finnegan v. United States, 204 F. 2d 105 (8th Cir.) (Gardner, C.J.), cert. den. 346 U. S. 821 (1953), for the proposition that the Government must elect between offenses. Finnegan does not stand for the proposition. In affirming a conviction on a multiple-count indictment, the case states the normal rule that if multiple offenses are of the same general character, they may be joined in one indictment and the Government need not elect between counts. 204 F. 2d at 109-110. It should be noted that no request for such an election was made by the appellant during the course of the trial.

It should of course be noted that appellant's prior testimony was used solely for impeachment purposes at the second trial

[R. T. pp. 271-272] and therefore, the contention that his fifth amendment rights were violated are utterly without substance.

CONCLUSION

Appellant Michael Allen McCowan received a fair trial. The record, taken as a whole, points to only one logical conclusion: that of Mr. McCowan's guilt.

It may not be said that appellant's Constitutional rights were violated, nor was he prejudiced by the filing of and trial on the superseding indictment.

The conduct of Government counsel, including his cross-examination of defense witnesses, was not unfair, but was aimed at a search for the truth in a case involving a clever, intelligent, talented police officer who violated the law.

For the reasons stated, the verdict of the jury should not be disturbed, and the judgment below affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stephen D. Miller
STEPHEN D. MILLER



CLOSING BRIEF OF APPELLANT

United States Court of Appeals

NINTH CIRCUIT

NO 20917

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

FILED

JAN 15 1967

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FEB 15 1967

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NO. 2 0 9 1 7

IN THE
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant.

Appeal from the United States District Court,
Southern District of California, Central
Division, Honorable Charles H. Carr, Judge.

CLOSING BRIEF OF APPELLANT

The facts and evidence in this case have been summarized in our Opening Brief, so we shall briefly herein refer only to the facts we deem most pertinent. We have discussed the law also sufficiently in said brief, so herein we shall only very briefly reiterate such points as we believe should be emphasized; namely, Points I and III-A.

I

We again assert that the trial court should have acquitted the defendant on the ground that, since Sections 1702 and 1708 of Title 18, U.S.C., do not apply to this case, the trial court lacked jurisdiction to convict him.

The facts clearly showing lack of jurisdiction were as follows: Defendant became acquainted with two sisters, Jean Ortiz and Joan Ansel. They entrusted him with certain fur coats, jewelry, guns, and a surgical kit used by Joan to remove a bullet from her husband's body. Joan went East and before leaving entrusted three diamond rings to McCowan. Later, Jean Ortiz told McCowan her sister wanted the rings, and together Ortiz and McCowan wrapped them in a package. McCowan, in the presence of Ortiz and with her acquiescence, consent and approval, addressed the package to Joan Ansel and placed his name on the package as sender but with the

post box number of Joan Ansel. Together he and Ortiz went to the post office and mailed the package, both standing together when it was presented to the postal clerk. He gave the money for the postage. Later, by using Form 1509, a sender's application for recall of mail, he obtained the package. The rings were thereafter sold by him.

Appellant contends that since he was either the sender or the agent for the sender, as the evidence establishes, he committed no offense under Sections 1702 and 1708 of Title 18, U.S.C. His offense, if any, was embezzlement or theft as an agent of his principal's property. For this he would be subject only to prosecution under California law. The rings were entrusted to him by Joan Ansel and he would be answerable to her as agent or bailee, but he committed no offense under the Federal statutes aforesaid.

This position is substantiated by the cases cited and quoted from in our Opening Brief (pp. 47-50), which seem to be the only cases pertinent to the issue; namely, *United States v. Bullington*, 170 Fed. 121; *United States v. Safford*, 66 Fed. 942; *United States v. Parsons*, 2 Blatchf. 104, Fed. Cas. No. 16,000; and *United States v. Driscoll*, 1 Lowell 303, Fed. Cas. 14,994.

The *Bullington* case held that any delivery to the writer before its conveyance in the mail, or to the agent of the writer, ended the authority of the government over the mailed item.

The above rule directly applies to the instant case, as McCowan was either the sender of the rings to Joan Ansel, who had entrusted them to him, or was her agent in mailing them to her. It must be noted that there was no evidence that Joan communicated directly with him to return the rings. The communication came through Jean, who told him her sister wanted them mailed. McCowan would have been justified in refusing so to do or to deliver the rings to Jean without positive authorization from Joan.

Furthermore, McCowan could also be considered as the sender or as the agent of Jean Ortiz in mailing the rings, since his name was placed on the package as sender, and this was done with Jean's authorization, consent and approval.

Whether he was considered as the sender of the package to Joan, as her agent, or as the agent of Jean Ortiz, he was nevertheless entitled, under Sections 1702 and 1708 of Title 18, to withdraw the package from the mail.

In our Opening Brief we quoted at length from the *Safford* case (pp. 48-50), but we feel a portion of the quotation deserves repetition. The Court stated:

"It would be reprehensible to assume that congress made a pretext of this power to establish rules of good conduct and punish violations of them between a principal and agent or to promulgate police regulations independent of the postal service, and after the postal functions had been performed. Such matters are of local concern, amenable to state law. It is but just that one who, having been delegated by another to receive his mail, and, having received it, should embezzle it, should be punished; . . . but we should not allow our anxiety to suppress immoralities and punish crime to cause us to ignore the proper tribunals and proper authority for the redress of grievances of this character. So a statute, broad in its terms, will be restricted by construction to the objects which the legislature had in view, and especially will its terms be restricted within the organic authority of the enacting body."

United States v. Safford, supra,
66 Fed. Rptr. 942.

It would clearly appear that while McCowan may be subject to prosecution by the State of California for theft or embezzlement as agent of his principal's property, he was not subject to prosecution under the Federal law herein involved, and he should, therefore, have been acquitted of the charges.

II

Under Point III-A of the Opening Brief, we pointed out that the defendant was denied a fair trial as guaranteed by the Constitution, because after the first trial in which the jury disagreed, the first indictment was dismissed and a new indictment was filed, tailored to meet the evidence introduced at the first trial. The wording of the second and superseding indictment was materially changed, so that defendant had to meet different charges based on evidence introduced in the first trial. If the original indictment wording had not been changed, defendant would have been in a much better position to secure an acquittal. Since, by the superseding indictment, he was placed in a materially more disadvantageous position, he was denied a fair trial.

We have discussed this point in the Opening Brief (pp. 2-5, 54-55) and in the Motion to Dismiss, a copy of which is included in the Clerk's Transcript, to which reference is made, so we shall not belabor the point further.

CONCLUSION

In conclusion, we respectfully submit that the judgment of conviction should be reversed and the appellant acquitted

of the charges.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on January 19th, 1967, I served the within CLOSING BRIEF OF APPELLANT (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19th, 1967, at Los Angeles, California.

D. A. Standefer

Subscribed and sworn to before me
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No. 20,920 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHINA UNION LINES, LTD.,
a corporation,

Appellant,

vs.

STATES STEAMSHIP COMPANY,
a corporation,

Appellee.

**OPENING BRIEF FOR APPELLANT
CHINA UNION LINES, LTD.**

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No. 20,920

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHINA UNION LINES, LTD.,
a corporation,

vs.

STATES STEAMSHIP COMPANY,
a corporation,

Appellant,

Appellee.

**OPENING BRIEF FOR APPELLANT
CHINA UNION LINES, LTD.**

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree entered in the United States District Court for the Northern District of California, Southern Division, the Honorable George B. Harris presiding, in favor of libellant, STATES STEAMSHIP COMPANY (Appellee herein) (hereinafter called STATES STEAMSHIP) against respondent, CHINA UNION LINES, LTD. (Appellant herein), and SS UNION STAR (hereinafter respectively called CHINA UNION and UNION STAR).

JURISDICTION

This cause was begun on the admiralty side of the District Court by libel *in rem* and *in personam* filed by STATES STEAMSHIP COMPANY as owners of the vessel SS ILLINOIS against the vessel SS UNION STAR and her owner CHINA UNION LINES, LTD., for damage suffered by the vessel, the ILLINOIS, in collision with the UNION STAR on August 26, 1960 (R.3-6). CHINA UNION LINES, LTD., filed a claim (R.7) and answer (R.9-13) together with a cross libel (R.14-20).

The cause was tried to the Honorable George B. Harris on May 18 and 19, and June 21, 1965. On November 9, 1965, the District Court filed its Order for Decree (R. 86-87) following which the District Court filed its Findings of Fact and Conclusions of Law (R.88-93) on November 29, 1965, as amended by a letter dated November 26, 1965, from attorneys for Appellant to Honorable George B. Harris (R.94). The Final Decree holding STATES STEAMSHIP and CHINA UNION equally at fault and entitling STATES STEAMSHIP to recover one-half of such damages from CHINA UNION was filed November 29, 1965, and entered December 1, 1965 (R. 95-96). Within 90 days thereafter, on February 18, 1966, CHINA UNION LINES filed its notice of appeal (R.99), and Cost Bond on appeal (R.112).

Jurisdiction of this admiralty matter was vested in the District Court under Article III, Sec. 2, of the United States Constitution and 28 U.S.C. 1333 (1).

Jurisdiction of this Honorable Court of Appeals exists under 28 U.S.C. 41, 1291, 1294, and 2107, Notice of Appeal having been filed within 90 days from entry of the Final Decree (R.99).

Jurisdiction of this Court also lies pursuant to Article III, Section 2, of the United States Constitution by reason of questions herein relating to the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948], T.I.A.S. No. 1871 and the Merchant Marine Act of 1936, 46 U.S.C.A. 1171 et seq.

STATEMENT OF THE CASE

In the preceding jurisdictional statement we have referred briefly to the nature of the proceedings and the pleadings that brought the case before the District Court.

In order that this Court may have a clear understanding of the questions that are involved in this appeal, we will review the main facts relative to the collision, as adduced from the testimony of the principal witnesses on both sides.

The collision occurred at about 11:43 A.M. on August 26, 1960, in the mouth of the Saigon River, approximately one mile from shore in the Baie des Cocotiers (Coconut Tree Bay) and off the town of Cape St. Jacques, South Viet Nam (Record 78). The navigable river channel in this area is approximately a half-mile wide at its narrowest point.

The UNION STAR is a Republic of China motor vessel about 328 feet long, with a 50-foot beam, of 3,705 gross tons and was powered by a 1,700 horsepower diesel engine turning a single screw. Her normal full speed, loaded, was about 10.2 knots. On the day of the collision, just prior to its occurrence, she was proceeding upstream from

the sea toward Saigon, piloted by Pilot Phan-Van-Dy, a duly licensed and qualified Saigon River pilot (Record 77). The UNION STAR was heavily loaded with sugar and her draft on departure from her prior port-of-call, Kaohsiung, Taiwan, was 20 feet, 5 inches forward and 21 feet, 4 inches aft.

In addition to Pilot Dy, Captain S. D. Hu, the Master of the UNION STAR, the Third Mate of the UNION STAR, and a quartermaster were on the bridge of the UNION STAR (Tr 251:16). On the forecastle head were the Chief Officer, the boatswain, the carpenter and a few seamen (Tr 251:12). There was a telephone between the forecastle and the bridge for the lookout to make reports (Tr 251:3,4). The usual engineering staff were on duty in the engine room and performed their duties in the proper manner.

The ILLINOIS is a steel steam turbine-driven vessel about 455 feet long of 7,640 gross tons. Her normal full speed loaded was a little in excess of 12 knots. At the time of collision, she was proceeding out of the Saigon River towards Koh-si-chang, Thailand. The ILLINOIS had left Saigon shortly before for the trip down the River under the command of Saigon River Pilot Phan Huu Hai with a light load and was drawing 16 feet, 10 inches (Record 77).

The watch on deck on the ILLINOIS at the time of the collision consisted of but two officers, the Master and the Junior Third Officer, and the man at the wheel (Tr 139:20, 24). There was no lookout on the bow nor anyone on the forecastle (Tr 140:6-10). The pilot, Hai, had left the bridge approximately five minutes earlier.

The UNION STAR had arrived at the entrance to the Saigon River early in the morning of the day of collision and anchored to the right of the channel to await the pilot (Tr 228:2,18-19). The actual position of anchorage, ascertained by cross-bearings, was about one and two-tenths miles due west of the light house on Nui Vang Tau, the coordinates of which position were latitude 10° 20 minutes north, longitude 170° 03.1 minutes east (Tr 228:4-12; 202:4-14). (See the chart attached hereto as Appendix B for this and other relevant positions.) Witnesses of the ILLINOIS dispute this anchorage position. However, this position is verified by a disinterested witness, Phan Huu Hai.

The ILLINOIS' pilot, Phan Huu Hai, testified that the UNION STAR was anchored upstream from the Kontum Buoy but downstream from the Korhyu Buoy (Tr 35:24, 25) and a little to the west of a line between these two buoys (R. 53: No. 45).

The pilot for the UNION STAR, Phan Van Dy, came aboard the UNION STAR about 11:22 A.M. (UNION STAR Log, Ex. N) and at 11:26 the UNION STAR commenced heaving in her starboard anchor (UNION STAR Log, Ex. N). Some fifteen minutes later, at about 11:36¹/₂ (UNION STAR Log, Ex. N), the anchor was finally free of the bottom and the vessel underway (Tr 203:7). As soon as the anchor was free of the bottom, a seaman in the bow untied the line which was attached to the anchor ball and lowered it onto the forecastle deck (Tr. 204:7-9).

Pilot Hai had seen the ILLINOIS before boarding the UNION STAR and made note of it again while ascending to the bridge of the UNION STAR with the Captain at

about 11:20 A.M. (Tr 204:25). At that time, the UNION STAR was heading visibly north-northwest (Tr 205:8).¹ The ILLINOIS was then located approximately one point off the port bow of the UNION STAR and some 2,000 meters distant (Tr 205:9).

The testimony of Pilot Dy concerning the position of the ILLINOIS is verified by all testimony of the ILLINOIS and her Pilot relating to the movement of the ILLINOIS down the Saigon River at that time. At that time, she was heading due south at approximately 13 knots on course 180° in the section of the channel between the Kumigawa Buoy west of Point Vung and Cape Eperon (Tr 31:1-24). The ILLINOIS continued on this southerly course until she reached Cape Eperon. She then changed course to the southeast (150°) and reduced speed to 6 knots to approach the pilot station in Coconut Tree Bay (Tr 32:1-9). About two minutes later, the ILLINOIS changed course further to the east (145°) and stopped engines to come to a position for disembarkation of the Pilot Hai (Tr 32:24; 33:12). When the ILLINOIS eventually came to rest at 11:35 (Tr 150:13), she was located approximately 400 meters to the northwest of the

¹Counsel for Appellee has previously placed great stress on this heading and on the words north-northwest as being a statement of the exact compass heading of the UNION STAR. While the term north-northwest can mean a particular exact compass heading, this does not seem to be Pilot Dy's inference here. The French word he used is "sensiblement" which was translated in the English version of the Pilot's statement as "obviously." However, a better word would be "visibly" as "sensible" and "sensiblement" have the general connotation of information sensed or perceived, i.e., a general estimate rather than an exact statement. Hence we have used the term "visibly" instead of "obviously" to correct what appears to be a misinterpretation of the Pilot's meaning.

Korhyu Wreck Buoy (which was, at the time of the collision, in a position to the southwest of and close to the western edge of the wreck). In that position, the bridge of the ILLINOIS was just "a shade to the west of the exit range line," i.e., about 100 feet (Tr 119:4-13).

Thus the ILLINOIS eventually stopped dead in the water about 11:35, shortly before the UNION STAR finally freed her anchor from the bottom and got underway. Pilot Hai then went into the chart house with Captain Sorensen, the Master of the ILLINOIS, to point out to Captain Sorensen the safe course for departure from the Saigon River. Inasmuch as the sea buoy (the London Maru Buoy) had washed away in a recent storm, Pilot Hai told Captain Sorensen that he should follow a special range in order to maintain the proper exit course (Tr 42:25; 43:1-4). This range was established by aligning the shore line at Point Vung with the peak of a mountain called Nui Ba Lai approximately eight miles to the north. If these two points were kept in alignment, the vessel would proceed on course 182° and safely exit the river (Tr 34:1-23). It probably took no more than a couple of minutes for Pilot Hai to point out the range line and land marks to Captain Sorensen, since he had made many passages in the Saigon River. So, at about 11:37, Pilot Hai started to leave the bridge of the ILLINOIS. Before leaving the bridge, Pilot Hai glanced toward the UNION STAR, which had just freed its anchor from the bottom a few seconds before. Apparently the seaman on the UNION STAR was still untying the line to the anchor ball as Pilot Hai says he saw the anchor ball still up before he turned to go below (Tr 43:19). He

also noticed that the ILLINOIS was still on a heading of 145° as he left the bridge (Tr 39:20-25). Pilot Hai then went below alone. He disembarked into his pilot boat a couple minutes later at 11:39 (Tr 106:4-6) from the port side of the ILLINOIS (Tr 119:23-25). It probably was another half minute or more before the pilot boat cleared the ILLINOIS so that it was safe for her to maneuver.

While Captain Sorensen was leaning over the port rail of the ILLINOIS bridge watching the approach of the pilot boat and the disembarkation of Pilot Hai, the UNION STAR was hauling down its anchor ball, heaving in on its anchor chain and starting to move forward. Her engines were put on full ahead at 11:37 (UNION STAR Engine Room Log, Ex. M) and her helmsman was ordered to steer course 348° (Tr 207:15) which was the UNION STAR's heading when she got underway (Tr 266:17-25; 267:1-6). The UNION STAR maintained this anchored heading upriver because the tide was slack and the outflow of the river kept the vessel turned upstream (Exhibit H—Hydrographic Office Publication No. 125, pp. 146-147). The 348° heading was maintained once movement commenced because it would have passed close to the Korhyu Wreck Buoy and along the far right of the river entrance toward the fairway of the river channel.²

²Counsel for Appellee has previously attempted to raise an inference that the UNION STAR was intending to follow the previously mentioned exit range up the river. The purpose for this attempt is clear as a basis for giving reason to the ILLINOIS story that the UNION STAR directed itself toward the ILLINOIS. Examination of the range line on the chart reveals, however, that following such a range upriver would merely lead a vessel into the shoals of False Bay. Furthermore, in the clear visibility, a course set to a point just east of the Kumigawa Buoy would be both the safest and most direct.

This course was chosen so that the UNION STAR would at all times be to the right of the 182° exit range line to a point at least a mile beyond the anchorage and thus in no way constrict the maneuvers of the ILLINOIS in coming to the 182° exit range (Tr 208:12-17).³

The UNION STAR proceeded full ahead on course 348° for approximately three minutes. During this time, the vessel traveled approximately three-tenths of a mile and reached a point some 200 meters to the south-southwest of the Korhyu Wreck Buoy. If UNION STAR had not been forced to alter its course, because of the movements of the ILLINOIS, the UNION STAR would have passed the Korhyu Wreck Buoy at about 100 meters distance on the starboard beam (Tr 209:21-25; 210:1-6). This would have brought the UNION STAR across the exit range a considerable distance upstream of the position of the

³The translation of Pilot Dy's statement needs some clarification on this point. The referenced translation in the record reads "the UNION STAR would be at all times to the right of the 002 degree range on a line of more than a nautical mile. . . ." This could be interpreted as meaning that the UNION STAR would at all times be more than one mile east of the 002 degree range line during its movement upriver. A cursory examination of the chart will indicate that a course one mile to the east of the mentioned exit range would always be at least in the shallows, if not ashore. Hence, the referenced translation of the French ". . . l'UNION STAR serait tout le temps à droit de l'alignement au 002° sur un parcours de plus d'un mille marin. . . ." seems questionable. The word "parcours" has several meanings including "line," "way" and "distance." It would seem that a more compatible and proper translation for the phrase might be "the UNION STAR would be at all times to the right of the 002 degree range line for a distance of more than a nautical mile." Examination of the chart will indicate that on course 348° from anchorage, the UNION STAR could have traveled about one nautical mile before it would have crossed the exit range line upriver from the position of the ILLINOIS when dropping her pilot.

ILLINOIS, even if the ILLINOIS had not moved from the position where the pilot was disembarking.

At about 11:40, since the ILLINOIS had not yet turned to leave the pilot station, Pilot Dy changed course slightly further to the east (course 353°) in order to pass the Korhyu Wreck Buoy as closely as possible and provide the utmost maneuvering room for the ILLINOIS turn (Tr 210:7-13). When this course change was made, the UNION STAR sounded one short blast on her whistle (Tr 239:12-17). At the same time, the engines of the UNION STAR were put on stop (Tr 239:21; UNION STAR Engine Room Bell Book, Ex. M).

The ILLINOIS, during this whole period, remained heading approximately southeast (145°). While on this continued southeasterly heading, then, sometime after 11:40, the ILLINOIS gave two blasts on its whistle (Tr 284:17-20). Shortly after the pilot launch left the side of the ILLINOIS and became visible to the personnel in the UNION STAR, the ILLINOIS' propeller could be seen throwing up large amounts of water and thus indicating that the screw of the ILLINOIS was turning rapidly (Tr 211:15-18). The ILLINOIS started moving ahead slightly on a course of approximately 145° (Tr 211:21,23; 212:4-10). At about the same time, the ILLINOIS blew two short blasts of its whistle and started a gradual turn to the left, cutting across the range line almost perpendicularly and threatening to cut across the course of the UNION STAR (Tr 213:2-8). The UNION STAR could not turn to the west without increasing the angle of meeting of the two vessels. Thus, the UNION STAR rudder was ordered hard right and the engines put full astern to

try to bring the vessels parallel (Tr 213:12-24). The vessels hit shortly thereafter at 11:43 (UNION STAR Log, Ex. N).

After the collision, the vessels maneuvered to separate and anchored. The captain of the UNION STAR investigated his damage and then boarded the ILLINOIS at about 1:00 P.M. to present his protest accompanied by Pilot Dy (UNION STAR Log, Ex. N). At 1:28, the UNION STAR then weighed anchor to proceed to Saigon before the flood tide ended (UNION STAR Log, Ex. N).

THE NAVIGATION OF THE ILLINOIS

The foregoing constitutes the Statement of the Case from the point of view of the UNION STAR. We should also examine the events as related by the ILLINOIS. In so doing, we find that this case presents a rather unusual situation. The maneuver of the ILLINOIS was so aberrant that it is immediately assumed by one first hearing the facts that such acts could not have happened. It is most unusual for a vessel to swerve across the course of another and to head for shore. Thus there is an initial tendency to think that the ILLINOIS' story is the only plausible one. However, we think that the flaws in the story of the Captain of the ILLINOIS will become apparent when examined in detail.

Captain Sorensen's story, while seemingly plausible, has serious defects of consistency and physical capability.

The fairest method of weighing the ILLINOIS version of the facts is to attempt to tell it in a narrative fashion, just as the statement of the case above.

We have one problem in this endeavor: The witnesses of the ILLINOIS are far from consistent and their facts are often at variance among themselves. Also, only one witness for the ILLINOIS was on the bridge at the time of the collision. We have only the testimony of Captain Sorensen, Master of the ILLINOIS, from which to glean the details of the navigation of the ILLINOIS and the exact positions of the vessels. Other witnesses could testify only to relative bearings unrelated to a heading for their own vessel. Thus, we are forced to adopt essentially the story of Captain Sorensen for the ILLINOIS version of the events.

Reverting back to the previous discussion of the facts of the case, it will be recalled that the ILLINOIS' pilot, Pilot Hai, left the ship's bridge at about 11:37. Pilot Hai noted at that time that the ILLINOIS was still on a heading of 145° (Tr 39:24).⁴ Captain Sorensen says that after the pilot left the bridge at 11:37 and before he gave his first helm or engine order, the ILLINOIS was heading between 180° and 185° (Tr 116:7-11). He accounts for this rapid swing on the basis of winds and currents (Tr 116:25; 117:1,2 and 20). In this regard, we might point out that Pilot Hai noted that the current was toward the south, but very weak (speed of one-half knot) (Tr 39:18), and there was a light breeze from the southwest (Tr 39:3).

⁴Counsel for Appellee has claimed that this answer is not responsive to the question in giving a course rather than a heading. However, this is merely a problem of translation. The French word used by Pilot Hai is "cap" or "head" rather than the word "route" which is the proper French for "course." Hence Pilot Hai has here responded as to the ILLINOIS' heading at the time he left the bridge, not as to the course previously followed.

After the ILLINOIS had spun around some 40 degrees in the three-minute interval, and the pilot had left the side of the ship, Captain Sorensen had the engines put ahead full. Since his vessel was slightly to the left of the exit range line and almost parallel to it, he ordered left rudder to come over onto the exit range (Tr 121:11). The vessel moved swiftly because by the time the Captain had reached the port wing of the bridge, the ship was right on the range line (Tr 212:16). The Captain then steadied the ILLINOIS on this line, on course 182° (Tr 122:1-9). At that moment, Captain Sorensen heard the whistle of the UNION STAR (Tr 122:9-11). He walked toward the starboard wing of the bridge (i.e., the side facing away from the near shore of the Bay of Coconut Trees) (Tr 122:22-25) and saw the UNION STAR some 300 to 400 feet (less than a ship length) away (Tr 128:1-9) heading east (Tr 123:22-24) and apparently cutting across the entrance to Saigon River, heading for the shoals.

Captain Sorensen ordered the engines stopped at 11:41 (Tr 124:1-6). Then 15 seconds later, full astern (Tr 124:7-9), then 15 seconds after that, full ahead and hard left rudder (Tr 124:23-24). Thirty seconds after that, the order full astern was given (Tr 126:23-25; 127:1-2). Then after another thirty seconds stop engines (Tr 127:7). The collision then occurred with the vessels parallel at that moment (Tr 127:8-11).

There are several serious flaws in the story presented by Captain Sorensen:

- (1) It is alleged that the ILLINOIS lay dead in the water and spun around at the rate of 13 degrees

per minute for three minutes while the UNION STAR was anchored, heading northwest without any radical swings for over ten minutes less than a mile away.

It is, of course, not impossible for a vessel to suddenly spin around quite rapidly in a short time. However, when other vessels in similar circumstances in the near vicinity are not so affected by the current, such alleged swings take on some of the aspects of a convenient means for rationalizing a different heading from that to which all other navigational data points.

While letters rogatory are cumbersome and not the best means of eliciting information about an event, it would seem that if the ILLINOIS were being turned so rapidly by the current, Pilot Hai would have mentioned this fact when asked if there was any change in the course or speed of the ILLINOIS during the two minutes between the time he left the bridge and the time he disembarked from the ILLINOIS (Tr 40:18-22).

Further, if the ILLINOIS had swung around 26 degrees in the two minutes before the pilot disembarked from the ILLINOIS, the pilot boat would have been on the same side as the UNION STAR. Thus, the UNION STAR personnel would have seen the pilot entering the pilot boat. However, Pilot Dy testified that when he first saw the pilot boat leaving the ILLINOIS, it was "just emerging from the bow of the ILLINOIS" (Tr 210:21-23).

(2) If the ILLINOIS had swung around to approximately course 182°, the UNION STAR would

have been on the port side of the ILLINOIS, not the starboard.

When Pilot Hai left the bridge of the ILLINOIS at 11:37, we have seen that the ILLINOIS was on a heading of 145°. At that time, Pilot Hai stated that the relative bearing of the UNION STAR was one point on the starboard bow of the ILLINOIS (Tr 56:18-21). This would place the UNION STAR on the east side of the channel and to the east of the exit range.

Thereafter, Captain Sorensen says the ILLINOIS swung around 40 degrees to approximately 182°. It had swung to this course, he says, at 11:40.

Yet Captain Sorensen then testifies that he went to the *starboard* wing of the bridge to take a bearing on the UNION STAR (Tr 120:2). Then again, when he says he heard the single whistle blast of the UNION STAR, he again "walked across the deck toward the starboard side" (Tr 122:23-24).

In fact, if the UNION STAR were located on the starboard of the ILLINOIS at a time when the ILLINOIS was heading south, the UNION STAR would be out in the middle of the river channel. To then say that the UNION STAR was in the middle of the channel heading east toward the Korhyu Wreck Buoy is to attempt to explain one unreasonable act by hypothesizing another. As we have mentioned earlier, such a hypothetical movement cannot be justified as an attempt by the UNION STAR to align herself with the exit range because this range has no bearing on the naviga-

tion of ships proceeding upriver from the pilot station.

(3) It is physically impossible for a vessel using an easy left rudder and full speed ahead to move 100 feet parallel in one minute.

Captain Sorensen stated that the ILLINOIS was moving ahead at about 3 knots in the time between ordering the left turn at 11:40 and settling on the range line at 11:41 (Tr 126:15).

This would give a speed of advance during the first minute of approximately 1/20th of a nautical mile or 293 feet.

The ILLINOIS is 455 feet long.

Obviously part of the ILLINOIS would have had to move sideways through the water to settle the ILLINOIS on the range line on course 182° by 11:41. It is even more ludicrous to imagine that this happened in the manner acted out by Captain Sorensen.⁵

Note, too, that the basic nature of a ship's turn is important. A ship swings as if on a pivot around

⁵"A. Then I told the Third Officer who was on duty, full ahead, full ahead. Then I told the man at the wheel, 'Come left just a little, matter of a couple of degrees, fellow. Take it easy now, just a couple of degrees.' Then I went to the port wing of the bridge, looked astern toward the range, was exactly smack on the range." "Q. I understand you went to the port wing and checked your position with relation to the range line?" "A. Yes, yes." "Q. Did you get on the range line?" "A. Yes, a couple of degrees left a little bit, to get right on the range line." "Q. What did you do when you got to the range, Captain?" "A. Well, I steadied the ship on the range, on that particular course." "Q. Do I understand from that, you gave an order to the helmsman?" "A. 'Steady now, she's moving very, very little.' I said, 'Steady now.' She was right on the range." (Tr 121:11-25; 122:1-9)

a point along its length. The exact position of this pivot point varies from ship to ship. It may be assumed for the average ship to be located from one-fourth to one-third of the length of the ship from the bow. Knight's *Modern Steamship*, 12th Ed., 192: "When the rudder is first put over and the stern starts to swing, the forces resulting from the momentum of the ship and the rudder action tend to move her sideways from the original course in the opposite direction to the turn" (Knight's *Modern Seamanship*, 12th Ed., 192).

Note too that Captain Sorensen estimated the turning radius of the ILLINOIS at 4 knots to be about 600 feet. Thus to move 100 feet parallel requires the movement over an "S" curve with two 600-foot radii (Tr 135:16-18).

(4) If the ILLINOIS had actually been headed south on the exit range on course 182° at 11:41, there would have been no collision as the ILLINOIS and the UNION STAR would have been on a divergent course.

Assume that the ILLINOIS had been 400 meters to the northwest of the Korhyu Wreck Buoy and to the west of the exit range line on a southerly course along said line. Assume further that the ILLINOIS stayed at all times directly on that line or to the west of it.

As indicated earlier, the UNION STAR's original course would have carried her to the east of the range line until a point some distance upstream (north) of the point where the ILLINOIS had dropped her pilot. Thus if the ILLINOIS had either remained at the pilot station or proceeded

downstream and out the river, the UNION STAR would have passed well astern of the ILLINOIS.

There is thus good reason to doubt the testimony of Captain Sorensen that the ILLINOIS was headed south between 180° and 185° at the time when the ILLINOIS started to move away from the pilot station.

THE ANCHORAGE POSITION OF THE UNION STAR

There remains to Appellee one method for rehabilitating the testimony of Captain Sorensen. This is to convince the Court that the UNION STAR was not originally anchored to the east of the channel but rather in the middle of the channel, to the west of the exit range line. Captain Sorensen has attempted to do this by testifying at various points that the bearing of the UNION STAR at anchor was 215° (Tr 118:1-4; 115:6). In his testimony, he does not clarify whether the 215° bearing was true or relative. However, in his diagram of the situation it becomes quite clear that Captain Sorensen has adopted a position for the UNION STAR anchorage which is in the middle of the Saigon River and on a true bearing of 215° from the point where the pilot disembarked.

One obvious problem with this version of the events is that there is no rational explanation for the development of a collision situation. If the UNION STAR were anchored at a point bearing 215° true from the place where Pilot Hai disembarked, she would be located several hundred meters to the west of the exit range line. From that position, the safest and most direct course up the river

would be due north. This course would naturally diverge from the course of the ILLINOIS proceeding out the river on the exit range.

Proctors for Appellee have attempted to rationalize an eastward movement of the UNION STAR from the anchorage hypothesized by Captain Sorensen. They suggest that the UNION STAR proceeded eastward, cutting across the bow of the ILLINOIS in order to get on the exit range and follow it up the river. As we have previously noted, the exit range is only useful for movement out of the river from this point. To follow it in would shortly lead a ship aground. Thus the anchorage position which Captain Sorensen claims for the UNION STAR is logically unconvincing and leads to no acceptable explanation of how the collision could have occurred under that version of the events.

Finally, Captain Sorensen's story concerning the UNION STAR's anchorage has internal weaknesses. First, Captain Sorensen testified that at 11:40 he took a bearing (Tr 153:17) which indicated the UNION STAR to be located at 215° (we will assume this to be a true bearing for the moment), approximately three-tenths of a mile distant (Tr 115:7-10). Her anchor was out and her anchor chain leading forward of the bow at a visible angle (Tr 151:16-19). Yet one minute later, at 11:41, when the UNION STAR "surprised" Captain Sorensen, she was heading east, clearly underway, and only 300 to 400 feet distant (Tr 123:19-24). The UNION STAR was said to be moving at 2 or 3 knots (Tr 125:12-25; 126:1).

Assume for the purpose of argument that the UNION STAR was located three-tenths of a mile from the ILLI-

NOIS bearing 215° T and heading slightly north of east with her anchor free of the bottom, lying dead in the water at 11:40. Presumably on the basis of these assumptions the UNION STAR would need only to put its engines ahead full in order to be located 400 feet off the starboard bow of the ILLINOIS at 11:41. However, in order to cover the two-tenths of a mile separating those points in one minute, the UNION STAR would have had to average a speed of 9 knots. Not only is such movement from a dead stop physically impossible for a ship such as the UNION STAR, but, in addition, Captain Sorensen testified that the UNION STAR's speed at the end of that minute was 2 or 3 knots. Further, Captain Sorensen said the UNION STAR's anchor chain was leading forward the minute before. Thus the UNION STAR would also either have had to heave in its anchor during that minute or drag its anchor along while covering the two-tenths mile distance.

Thus Captain Sorensen's placement of the UNION STAR's anchorage at a point in the middle of the Saigon River to the west of the exit range is internally inconsistent and logically implausible. This placement should be ignored in favor of the anchorage location indicated by witnesses of the UNION STAR which was corroborated, as we have seen, by the only impartial witness, Pilot Hai.⁶

⁶Pilot Hai placed the UNION STAR anchorage upstream from the Kontum Buoy and downstream from the Korhyu Buoy (Tr 35:24, 25) and slightly to the west of a line between the buoys (Record 53: No. 45). Pilot Hai also said that when the ILLINOIS was on a heading of 145° T, the relative bearing of the UNION STAR was one point on the starboard of the ILLINOIS (Tr 56:18-21). This second position plots in about the same position as the first, both of which are consistent with the UNION STAR testimony.

Only one other witness purported to give a position for the UNION STAR prior to the time she got underway. This witness was Second Mate McCarthy, who was loyal to his Captain but even less convincing. McCarthy states that the UNION STAR was located about 2 points (22°) off the starboard bow of the ILLINOIS at a distance from a half to one mile. Unfortunately, this bearing is not very useful in establishing the position of the UNION STAR as we do not know the heading of the bow of the ILLINOIS at the time. An attempt to make this bearing meaningful by attempting to fix the time of the visual bearing and relating it to a previously determined course proves unsatisfactory. McCarthy's testimony as to the time of the bearing or the location of the ILLINOIS proves to be vague or inconsistent.⁷

⁷At one point Mate McCarthy indicated that he was just abeam of a wreck called Alfonso's Wreck which is apparently down near the Korhyu Wreck Buoy and thereafter, indicated that the vessel was not at that point but at a point approximately abeam of Cape Eperon. Then Mate McCarthy indicated that the position could be a little further south and, in fact, the inference is that Mate McCarthy is not clear where the ILLINOIS was at the time. The only inference we can draw from the totality of Mate McCarthy's testimony is that the ILLINOIS was probably still heading south on course 180° at the time that he made the observations alleged. We draw this inference for several reasons:

- (1) Lunch was served aboard the ILLINOIS at 11:30 (Tr 62:4; 69:1).
- (2) McCarthy indicated that he felt the engines stop while he was eating (Tr 75:18-25).
- (3) The engines stopped at 11:32 (Tr 155:20).
- (4) In order to be in the dining salon and eating at the time the engines stopped at 11:32, Mate McCarthy must have left the bridge of the ILLINOIS some time prior to 11:30. McCarthy indicated that he was on the bridge for approximately 5 minutes before going to lunch (Tr 62:11-13).
- (5) McCarthy makes no mention of any course change during the five minutes that he was on the bridge although he was asked about the course and indicated that he did

Thus in summary there is no doubt on the basis of all the evidence that the UNION STAR was anchored near the east shore of the Saigon River and to the east of the exit range line in about the position testified to by the pilots for both vessels and by Captain Hu of the UNION STAR. From this anchorage position, the UNION STAR clearly proceeded up the east side of the channel, close to the Korhyu Wreck Buoy and to the east of the exit range. Any other course suggested by the evidence would have been physically impossible under the circumstances given a collision close to the Korhyu Wreck Buoy and slightly to the northwest of it. Finally, all evidence points to the fact that the ILLINOIS did not swing southward while dead in the water at the pilot station but rather remained approximately on the 145° heading on which she came to a stop.

not know what course was being steered at the time he was on the bridge (Tr 69:5-11).

- (6) Consequently, there is strong inference that the ILLINOIS was probably on a single course at the time that Mate McCarthy was on the bridge and that this single course was a course being followed by the vessel prior to 11:30. The only steady course followed for five minutes or more prior to 11:30 was the 180° followed up to the time the vessel was abeam of Cape Eperon. Consequently, we would infer from the sketchy testimony that the ILLINOIS was probably on course 180° at the time of McCarthy's relative bearing. On the basis of this evidence, a position 180° and approximately one mile distant is in fact the most accurate position which can be plotted from Mate McCarthy's testimony. Even if the ILLINOIS were on course 159° at the time Mate McCarthy saw the UNION STAR the bearing would not at all coincide with any other testimony of the UNION STAR's anchorage in this case.

EXPLANATION OF THE NAVIGATION OF THE ILLINOIS

If one grants, as one must, the validity of the testimony of the UNION STAR's witnesses and of Pilot Hai, what explanation can be made for the bizarre movements of the ILLINOIS and for the testimony of her Captain. We would suggest that almost all of the testimony of Captain Sorensen can be reconciled if we grant that he made one slight mistake just prior to the time of collision.

It will be noted that if it is accepted that the ILLINOIS remained on an eastward heading of 145° while releasing her pilot, then Captain Sorensen's testimony that the UNION STAR was located on the starboard side of the vessel becomes correct. In fact, the 215° bearing (which would be approximately one point off the starboard bow if heading at 182°) becomes the approximate relative bearing of the UNION STAR anchorage when the heading of the ILLINOIS is 145° . This would, incidentally, conform exactly to the testimony of Pilot Hai of the ILLINOIS (Tr 56:18-21).

Pilot Hai had cautioned Captain Sorensen that it was very important to keep properly aligned on the exit range in order to safely leave the river. This range caused Captain Sorensen some difficulty for several reasons. For one, the range marks were probably difficult to discriminate and keep in sight, one being merely the curve of the shore and the other the peak of a mountain 8 miles away. The Hydrographic Office Sailing Directions (H.O. Publication No. 125, Ex. H) indicates that the range marks for the normal entrance (which is a *different* range from the *exit* range which is at issue in this case) are difficult to recognize due to the surrounding foliage (Ex.

II, page 149). It is probable that the curve of the shore serving as the closer *exit* range mark was similarly obscured by surrounding foliage. The second reason why Captain Sorensen was nervous and apprehensive about the departure from the pilot station was that there were no buoys or other navigational marks ahead of the vessel by which to guide his departure once he passed the Kontum Buoy. Thus he faced an unmarked expanse of river and sea, knowing that passage through only one small part of it was safe. Thirdly, the only guidance which Sorensen was to have on this passage through this region was the range and the range marks upon which the course was to be based were located in a direction opposite the direction of travel of the vessel. This is a relatively unusual set of circumstances in any harbor and, when such instances occur, the navigation is the responsibility of a pilot. Here Captain Sorensen was faced with the unusual problem of safely navigating southward based on solely reference points astern of the vessel. This would require Sorensen to navigate and give helm commands while facing aft.

One can easily imagine the problem he perceived. When the range marks opened in such a way that he knew from his experience that a right rudder command was necessary, for this passage he would have to give a left rudder command. Captain Sorensen undoubtedly had the need for this conversion of his helm orders in the forefront of his mind so to speak.

When it came time to get underway, however, the ILLINOIS was not facing south along the range line, but rather at an angle to it. Thus initially he wanted to turn

south. The proper command was a gradual right turn (Tr 207:5-11). As Captain Sorensen stood facing north,⁸ however, his mind was preoccupied with the necessity of reversing the commands for this exit. Thus, as he stood then facing the exit range markers, he gave a gradual left rudder command.

Shortly thereafter as the ILLINOIS started to swing across the range line, Sorensen realized his error. He immediately stopped the engines and ran to starboard to analyze his vessel's position with respect to the inward bound UNION STAR. Seeing the proximity of the UNION STAR, he ordered the engines back full. Sorensen immediately realized that the momentum of the ILLINOIS' swing to the east was too great to stop in time. He thus put the ILLINOIS' rudder hard over to the left and her engines at full ahead to attempt to bring the vessel parallel to the UNION STAR. The Captain of the UNION STAR complemented this action by reversing UNION STAR's engines and swinging her stern to the north so that when the vessels met they were parallel.

We believe that the foregoing account fairly represents the events leading up to the collision on August 26, 1960. While the cause of the accident was understandable, to us, a captain is given few chances for error, reasonable or

⁸Counsel for ILLINOIS tried to establish that Captain Sorensen was standing on the port wing of the ILLINOIS' bridge, facing aft on course 180° when the first helm order was given by Captain Sorensen. Captain Sorensen's reply was to qualify that implication as he said, "Yes, that is, in other words, due north, due north" (Tr 122:10-17). Again, Sorensen's actual recollections came through and he indicates that when facing north, he was not facing aft as the ILLINOIS was not on a southerly heading at the time, but rather heading southeast on a 145° heading.

not. The left hand turn of the ILLINOIS was a known and irrevocable fact, as was the position of the ILLINOIS when she reached the pilot station. The heading of the ILLINOIS when she started again at 11:40 after the pilot's departure was not clearly documented and probably was not carefully noted. Thus, it could be said that if the ILLINOIS were heading south at the time she got underway, the orders of the ILLINOIS helm would be proper and faultless. Thus, when the log was written that day on the ILLINOIS describing the events of the collision, specific mention was made of the fact that the ILLINOIS was on a heading of 180° true, while no other headings were given in the log (not even an indication of whether the reported bearing of the UNION STAR was relative or true).

It seems significant in corroboration of the above detailed description of the events of the collision that Captain Sorensen did not present Captain Hu of the UNION STAR with a protest after the collision at the time Captain Hu protested to Sorensen (Tr 244:15-25; 245:1-11). It is also significant that the counsel for ILLINOIS presented no witness other than Captain Sorensen who had any knowledge of the details of the navigation of the ILLINOIS. Even the testimony of Pilot Hai was obtained only after much objection from ILLINOIS counsel.

To summarize, the UNION STAR simply started up the Saigon River to the far right of the channel, keeping at all times as far to the right as possible to give the ILLINOIS room to turn south and depart from the river. By mistake, the ILLINOIS initially turned to the left across the exit range line and across the course of the

UNION STAR. The proximity of the vessels did not allow maneuvering room to correct this error. Since the vessels were both proceeding quite slowly, the subsequent maneuvers of both captains were adequate to bring the vessels parallel before they collided, facing eastward on the far east side of the channel with the ILLINOIS to the north.

SPECIFICATION OF ERRORS

1. In finding and concluding that libelant was entitled to a decree, and in entering a decree in favor of libelant in the amount of \$20,937.48.

2. In finding and concluding that libelant was entitled to damages.

3. In finding and concluding that respondents and cross-libelant were negligent.

4. In finding and concluding that the damages claimed by libelant were caused by the negligence of respondents and cross-libelant.

5. In failing to find and conclude that the damages which libelant alleged, to the extent such in fact occurred, were caused by the greater fault of libelant and failing to apportion the damages awarded accordingly.

6. In excluding the testimony of respondents' and cross-libelant's witness Marine Engineer John V. Walsh that libelant's vessel could have been repaired in a shipyard in Japan for a cost far below the cost of repairs actually incurred in a shipyard in the United States.

Offer of testimony by expert witness John V. Walsh that repairs to libelant's vessel could have been made in a

port in the Far East at a cost approximately \$25,000 less than that incurred in the United States by respondent (Tr 305:3-306:8). Objection to the evidence on the grounds of irrelevance was sustained (Tr 306:5-8).

7. In finding and concluding that libelant's subsidy contract with the United States justified charging respondents and cross-libelant with costs of repair of libelant's vessel incurred in the United States in excess of the much lower costs of repair available to libelant at the same time in Japan.

8. In finding and concluding that libelant was entitled to include as an item of its damages the cost of dry-docking its vessel at the Puget Sound Bridge & Drydock Co.

9. In failing to find and conclude that the libel was barred by laches and that libelant had failed to prove excuse for late filing of the libel and to show that respondents and cross-libelant had not been prejudiced by the late filing.

10. In awarding libelant as damages costs of repair to its vessel incurred at the Puget Sound Bridge & Drydock Co. in excess of the much lower costs of repair available to libelant at the same time in Japan.

11. The decree is contrary to law in that it is not supported by the findings of fact.

SUMMARY OF ARGUMENT

1. The Findings of Fact of the trial court are not supported by the evidence. This Court is entitled to re-examine the findings of fact since all the evidence on the navigation of the vessels was presented to the trial court by deposition. *The Ernest H. Meyer* (9th Cir. 1936) 84 F.2d 496, 501.

2. The UNION STAR was not at fault in any way. The trial court erred in finding that the UNION STAR had no lookout and that such absence of lookout resulted in a lack of information aboard UNION STAR which contributed to the collision (R.91). The UNION STAR had a qualified lookout at all times and was continually aware of all movements of the ILLINOIS (Tr 276:1-4). The navigators aboard the UNION STAR lacked no information perceivable from the UNION STAR concerning the ILLINOIS' movements. On the basis of all the perceivable information, the UNION STAR was properly navigated at all times and did not contribute to the occurrence of the collision. Thus The Finding That The UNION STAR Was At Fault Should Be Reversed.

3. The trial court committed reversible error in failing to make any findings concerning both the events leading to the collision and the allegations of fault based thereon (Order—R.87) since the applicable rule of damages was one of apportionment based upon relative gravity of fault (Tr 287:11-23).

4. The trial court erred in failing to find that the ILLINOIS committed several serious faults of navigation in attempting a difficult maneuver in close proximity to the UNION STAR and in turning east across the course

of the UNION STAR. The ILLINOIS was obligated, under the circumstances, to keep to her starboard side of the channel and pass port to port. *The Vanderbilt v. McKibbin* (1869) 73 U.S. (6 Wall.) 225, 230, 18 L. Ed. 823. The failure of the ILLINOIS to observe this rule of navigation was the primary cause of the collision (Tr 213:2-4). Thus The District Court's Finding Should Be Modified To Hold The ILLINOIS Solely At Fault In Causing The Collision At Issue.

5. The libel is barred by laches and should have been dismissed. The libel was filed beyond the analogous two-year limitation period under the law of Viet Nam for property damages actions (Tr 322:17-25) applicable by reason of the California "borrowing statute." California Code of Civil Procedure section 361. Because the libel was filed beyond the analogous limitation period, libelant had the dual burden of proving an excuse for delay in filing and non-prejudice to appellant. *Brown v. Kayler* (9th Cir. 1959) 273 F.2d 588. Absolutely no evidence of an excuse for the delay in filing was introduced by libelant, and there was overwhelming evidence of prejudice to appellant by reason of the late filing, including unavailability of key witnesses (such as the helmsman and watch officer of libelant's vessel) and vagueness in the memories of available witnesses (Tr 100:20-101:15). The libel should therefore be dismissed.

6. Libelant's \$40,053.60 item of damages for vessel repairs performed in the United States (Respondent's Exhibit O, p. 10; Finding of Fact X, States Steamship Company, Item 9, R.85) was excessive and unreasonable and should have been stricken from the damages allowed

libelant because libelant failed to mitigate its avoidable damages as required by law (American Law Institute, *Restatement of Torts*, Section 918) by obtaining the most reasonable costs of repair available at the time of the collision. (Tr 298-299; 305-306) *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, 1938 A.M.C. 1419. Libelant also failed to sustain its burden of proof that the cost of repair to its vessel was reasonable, and the item should therefore be stricken. *Carolinian-San Clemente* (N.D. Cal. 1948) 1943 A.M.C. 758.

Libelant's defense that it was required to perform its repairs in the United States by reason of its subsidy contract (Res. Exhibit R) is not supported by the applicable Federal statute (46 U.S.C.A. 1176(7)) or by the subsidy contract, and even if either did require such exorbitant repairs, appellant cannot legally be charged with the excessive cost. *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309, 72 L. Ed. 2d 290, 292. Furthermore, to enforce this excessive cost of repairs against this vessel of the Republic of China would violate the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948] T.I.A.S. No. 1871.

7. The trial court committed reversible error in ruling (Tr 306:5-8) irrelevant and inadmissible testimony of appellant's expert witness that libelant's repair costs were excessive and that much lower costs of repair were available in the Orient (Tr 305:13-306:8). The availability of lower repair costs was clearly relevant under universally accepted principles of tort and admiralty law.

Zeller Marine Corp. v. Nessa Corp. (2d Cir. 1948) 166 F. 2d 32, 1948 A.M.C. 418; *The F. J. Luckenbach* (E.D. Pa. 1929) 42 F.2d 279; *Carolinian-San Clemente* (N.D. Cal. 1943) 1943 A.M.C. 758; *Atkins v. Alabama Drydock & Shipbuilding Co.* (S.D. Ala. 1961) 195 F.Supp. 944, 1961 A.M.C. 909.

8. Libelant's \$5335 item of damages (Respondent Exhibit O, p. 10, R.85) for drydocking its vessel during repairs should be stricken. The drydocking was unnecessary to perform the repairs arising from this collision according to the only expert who testified on this subject (Tr 310:23-312:13), and libelant introduced no evidence to sustain its burden of proof that the drydocking was necessary or the expense reasonable. *The Cape Friendship* (D. Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958.

I. THIS COURT IS ENTITLED TO RE-EXAMINE FINDINGS OF FACT BASED SOLELY ON DEPOSITIONS.

There is an old saying that an admiralty appeal is a trial *de novo*. This is probably an unfortunate phrase in its implication of "an actual repetition on appeal of the trial below, when, in fact, that has never been the practice." Staring, *Admiralty Appeals*, 35 Tul. L. Rev. 7, 51 (1960).

What the term does mean is that among the powers of the Court of Appeals sitting in admiralty is the power "to do actual justice, free, as we have already noted, of the rigid limitations inherent in a system based on jury trial." (Staring, *op. cit.* p. 51)

This power is usually exercised with considerable restraint where the testimony below was from witnesses present in court because the findings of fact in the trial court are based in part upon the balancing of credibility of the witnesses. Where the demeanor of the in-court witness affects the balance in the mind of the trial court, there can be no proper review of this finding from the cold record.

When, however, as in the case at bar, the findings of fact are based entirely on testimony taken outside of court, the findings of the trial court are based on no more evidence than is available to the Court of Appeals. Hence the findings of fact of the District Court are entitled to lesser weight than would ordinarily be the case. As this Court so well stated in *The Ernest H. Meyer* (9th Cir. 1936) 84 F.2d 496, 501:

“Pursuing the principle of the *Ariadne* thus controlling the Supreme Court, we weigh the evidence in an admiralty new trial with the rebuttable ‘prima facie’ presumption that the findings of the District Court are correct, just as any trial court weighs evidence where a presumption has been established. *The value of this presumption in determining the total weight of the evidence is affected by the amount of testimony below which was actually heard by the Court, and the amount, if any, in depositions.* Where all the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption has very great weight.

“It is obvious that, where the testimony is in part in deposition and in part heard by the Court, *and the conflict is between the heard and the unheard wit-*

nesses, there cannot be a balancing of credibility between the two. In such a case, and where all or substantially all of the evidence pertinent to the finding is given by deposition, the presumption is of lesser weight and more easily may be rebutted. *The Natal* (C.C.A. 9) 14 F.2d 382, 384: 'The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly upon depositions.' *U.S. v. Los Angeles Soap Co. et al* (C.C.A. 9) 83 F.2d 875, decided May 14, 1936.

"In this case the evidence of all the officers and crews of both vessels, testifying to their control of their respective movements toward the collision, is by deposition. The presumption supporting the findings below, therefore, *has the slight weight described in The Natal, supra.*" [Emphasis added]

We consequently respectfully submit that this Court is entitled to completely review the facts of the case at bar in order to make a finding as to the manner in which the collision occurred and in order that the findings will be supported by the evidence.⁹

⁹In re-examining the facts of this case, it is important that this Court be aware of the peculiar nature of the evidence available. Opposing counsel has made a point, from time to time, of the incomplete nature or confusing quality of some of the evidence presented by Appellant. We are sure we need not belabor the point that while opposing counsel has a client located in the city in which the action took place and witnesses and records in his own tongue, Appellant's evidence is generally either in halting English or translated French. For example, a review of Captain Hu's deposition indicates clearly that he did not understand certain questions and some answers are clearly suspect on this basis. (Also, the fact that he was testifying some four years after the event without any notes or other basis for refreshing his memory results in some clouded recollections which tend to be exaggerated ((particularly in distance)) in his mind.) The testimony of the two pilots was taken by letters rogatory by trans-

II. UNION STAR WAS NOT AT FAULT IN ANY WAY.

The District Court found that the UNION STAR was negligent and that such negligence was a cause of the collision. The Court further erroneously found that the UNION STAR's fault was equal to the fault of Appellee and that the damages claimed by Appellee were caused by such negligence (Record 91-93). These findings are unsupported by the facts in the record.

A. UNION STAR was not at fault for "absence of a proper lookout."

The only causative fault attributed to the UNION STAR which is identified in the findings of the District Court is the finding that "There was no one aboard the UNION STAR who was posted and designated as a lookout and functioning as such, unencumbered with other duties or responsibilities." Consequently, the Court found "That the absence of timely and accurate information and knowledge aboard the UNION STAR regarding the movements of the ILLINOIS contributed to the ensuing collision" (Record 91). The District Court was in error in so finding.

1. The UNION STAR had a proper qualified lookout.

It will be shown from the Record that the UNION STAR did have a proper lookout on the bridge, that those in charge of the UNION STAR navigation observed the

lating all English questions into French and translating all French replies back into English. The problem of language differences, the extreme length of time between the occurrence in Viet Nam and the time when the depositions were taken, the cumbersome and inaccurate procedure of obtaining testimony by written interrogatories over thousands of miles, the elimination or loss of many of Appellant's key witnesses by death, distance, and the war in Viet Nam make it difficult to match the smooth surface consistency of the story of the ILLINOIS witnesses.

ILLINOIS early and continuously, that there is absolutely no evidence in the record that there was no lookout in the bow of the UNION STAR, and that even if there was an absence of a lookout in the bow of the ship, such an absence would be entirely irrelevant and have no causative relation whatever to the collision.

It must be kept in mind that on the day in question, the visibility was good (ILLINOIS Log Ex. 3). Pilot Hai, on board the ILLINOIS, estimated that he "was able to see the M.S. UNION STAR when we were at a distance of not less than six miles from her" (Tr 38:11-13).

This case then, does not involve a collision between vessels navigating in a fog, or under conditions of impaired visibility. No contention is made by either vessel that there was any difficulty in clearly seeing the other vessel and its maneuvers. Moreover, there is no contention by the ILLINOIS that the UNION STAR did not timely see it and thereafter follow its every move, or that those on watch on the UNION STAR were otherwise occupied than with the conduct of the ILLINOIS, as it proceeded towards the UNION STAR.

There were four men on the bridge of the UNION STAR, the point of greatest vantage, who were concentrating on the channel downstream (Tr 251:16): the pilot Phan Van Dy, the Master Captain Hu, the Quartermaster, and the Third Officer. On the forecastle were the Chief Officer, the boatswain, the carpenter, and a few seamen (Tr 251:12).

Pilot Dy had seen the ILLINOIS well before boarding the UNION STAR. As soon as he reached the bridge of the UNION STAR, he again noticed the ILLINOIS

(Tr 204:25; 205:1-3). Pilot Dy observed the ILLINOIS continuously, noticing among other things, the emergence of the pilot boat from behind the bow of the ILLINOIS (Tr 210:21-23). Pilot Dy observed the kick of water as the ILLINOIS' propeller began turning at full ahead revolutions while the ILLINOIS was on an apparent gyro heading of 145° (Tr 211:15-22). Of course, Pilot Dy continued to observe the ILLINOIS thereafter until the impact of the collision.

Captain Hu, Master of the UNION STAR, observed the ILLINOIS at the time the UNION STAR commenced heaving in its anchor (Tr 230:19-25). The subsequent testimony of Captain Hu indicates that he was watching the movements of the ILLINOIS at all times although his recollection of what he saw was somewhat clouded four years later at the deposition. Frequently Captain Hu mentions a series of bearings taken on the ILLINOIS to check its position relative to the UNION STAR (Tr 238:3, 18-20; 239:12-15). Captain Hu recalled seeing the pilot boat near the ILLINOIS. Once the anchor of the UNION STAR was free of the bottom and she was underway, Captain Hu stationed himself on the starboard wing of the bridge where he remained until shortly before the collision (Tr 264:4, 13). Captain Hu observed the bow wave of the ILLINOIS indicating she had started moving forward (Tr 269:5-9). Captain Hu further testified that from the time he came on the bridge and saw the ILLINOIS, he continuously watched her until the time of collision (Tr 276:1-4).

From the foregoing it is established conclusively that two officers with master's licenses were watching the

navagation of the ILLINOIS at all times and that for most of the period while the UNION STAR was underway prior to the collision, the Master was on the wing of the bridge doing nothing except observing the ILLINOIS. He watched the ILLINOIS continuously from the time he first saw the vessel until the time of the collision, standing on the starboard wing of the vessel almost all of this time.

Consequently, Captain Hu's undivided attention was as lookout watching the ILLINOIS, so that, from the time the UNION STAR got underway, he neither had other duties to perform, nor did he perform any other function, until the situation was such that collision was inevitable. He testified that he watched the ILLINOIS continuously from the time he first saw the vessel. No other lookout could have done more, no matter who he might have been or where stationed.

Pilot Dy also saw the ILLINOIS, observed her course, and actually watched her movements continuously. Thus the man in charge of the UNION STAR's navigation and the man acting as her lookout on the open bridge both saw the ILLINOIS and observed her continuously. What another lookout, in the bow or any place else, could have added to this is difficult to see.¹⁰ Such a lookout could

¹⁰Counsel for Appellee have stated that a lookout might have reported the ILLINOIS' whistle signal. However, there was no need for the lookout to repeat the whistle signal as it was clearly heard by Captain Hu and Pilot Dy. As Captain Hu explained in his deposition (Tr 284:13-25; 285:1-24), his prior statements that he heard whistle signals from the ILLINOIS were correct and any inconsistency in the deposition is due to the lapse of time. Thus there was no whistle signal unheard by Captain Hu as implied by counsel for Appellee.

not have furnished to those on the bridge any information which they did not already have.

In addition, the District Court erred in finding there was no specifically designated lookout aboard the UNION STAR. There is no evidence to support this finding. Captain Hu was never asked whether or not there was a lookout. In fact, the evidence indicates that there was a lookout but that he was not making any reports under the circumstances:

“Q. After you heaved anchor, but before the collision, did the lookout make any reports to the bridge?”

“A. No, because the weather was very clear.” (Tr 251:8-10)

Consequently, even to find that there was no specifically designated lookout aboard the UNION STAR is a finding completely unsupported by the evidence. On this ground alone, the decision below should be reversed.

2. **Assuming, arguendo, that no specially designated lookout were posted, UNION STAR nevertheless had adequate lookouts at all times.**

Assume, however, for purposes of this assignment of error that it could be found on the basis of the facts in the record that there was no specially designated lookout. Even then the UNION STAR could not be deemed legally at fault.

Under the circumstances of this case the decisions (such as those cited by the District Court (Record S7)) condemning a vessel for failure to have a proper lookout, on the bow or elsewhere, are not in point. In those cases

the men in charge of the vessel did not see clearly what the other ship was doing, and a proper lookout might have given them the missing information and so avoided trouble. Here, those in charge of the UNION STAR saw everything that was to be seen, and no suggestion is, or can be, made that a lookout on the bow could or would have seen more than did Pilot Dy and Captain Hu.

To put it differently, the law does not lay down formal rules of thumb for a lookout the violation of which automatically carries a penalty. The lookout is only a part of the general requirement that every vessel shall take all reasonable precaution to avoid accidents by informing itself of the presence and movements of any other craft which may present a hazard. If in fact the vessel does see and follow the movements of such other vessels, she has done all that is necessary as far as lookouts are concerned. *The Victory* (1894) 63 Fed. 631, 638.

The law requires only that the vessel's navigator be informed of the presence and movements of other vessels, not that he be so informed by a lookout on the bow or any place else. He need not require that the information he obtains be relayed from a lookout, but rather, may, as was the case here, gain information for himself by his own observation and by that of a lookout on the bridge.

If we may draw an analogy, we can compare this question to the issue of seaworthiness. Failure to exercise due diligence to make a vessel seaworthy is immaterial if in fact the vessel was seaworthy. So, in this case, the failure of the UNION STAR to have a lookout in the bow to observe the ILLINOIS is immaterial when her pilot and lookout on the bridge saw the ILLINOIS, observed its

course, and followed its movements continuously thereafter.

It was claimed in the trial court by opposing counsel during oral argument that a lookout on the forecastle might have heard the ILLINOIS' two-blast signal and that she thus would have known the intentions of the ILLINOIS, thus avoiding the collision.

In the first place, the two-blast signal was heard by all persons on the bridge and a report from the forecastle lookout would have been merely an unnecessary added drain on the navigator's time and attention.

However, let us assume that the lookout in the bow of the UNION STAR had given the bridge a report of the two-blast signal of the ILLINOIS. The situation would not have been altered in any particular. The UNION STAR would have done, and was legally required to do, exactly what she did—to keep to the far right of the river allowing the ILLINOIS the most possible room to maneuver.

Thus, a report to the bridge from the lookout on the UNION STAR's bow of his having heard the ILLINOIS' signal would have made no practical difference whatever—under all possible theories of the case the UNION STAR was entitled and required to do exactly what she did. Hence the absence of a forecastle lookout, even if it is assumed that he was absent, had no causative relation whatever to this collision. Thus clearly the failure of the forecastle lookout to make a redundant report could have no causative relation whatever to the collision.

The authorities leave no doubt whatsoever that the absence of a particular kind of lookout or even any lookout

at all is of no importance unless it is shown that such fault contributed to the collision. Decisions on this point may be multiplied endlessly.

Typical of the decisions is that of the Circuit Court of Appeals for the 4th Circuit, in the case of *The Georg Dumois*, 153 Fed. 833 (4th Cir. 1907) at page 835, wherein it was held:

“Does the testimony show that, had a lookout been on duty at the time, that the collision would have been prevented? If so, the steamer was at fault; if not, the absence of the lookout was immaterial. In other words, it is well understood that faults which do not cause a collision or that have not borne directly upon it, are unimportant.” (Citing cases)

In the case of *The Catalina* (9th Cir. 1938) 95 F.2d 283, 1938 A.M.C. 495, in a factual situation not dissimilar to our situation, this Court held that the burden was upon the vessel claiming faulty lookout to prove that fact. The ruling in that case is particularly appropriate here, both on the question of other duties of the lookout and on the question of hearing whistles. This Court said:

“B. With regard to the attention of the lookout to his duties, the Ariadne rule (*The Ariadne*, 13 Wall. [80 U.S.] 475, 20 L. Ed. 542, 543 [1872]) requires the highest watchfulness, but this does not alter the burden of proof on the *Catalina* to establish that it was not exercised by the *Arbutus*' lookout. *When such proof is made*, certain adverse presumptions may arise as to its causative effect, but the proof of the lack of attentive watchfulness must come first.

“The lookout was a qualified seaman. Two facts are offered to show his inattention in the approach of the collision. One was that he was ordered to wipe

the spray off the pilot-house windows. This, however, could not have been causative of the collision, because he had paid no attention to the windows after wiping them off some twenty minutes before the Catalina was sighted.

“The other fact was that he did not at any time hear the whistle of the Catalina. No one else on the Arbutus did. The testimony clearly supports the finding of the lower court that the motors on the Arbutus, nor the exhaust [sic], did not interfere with the lookout’s hearing. The deflection of whistles in a fog so that they are heard at a greater distance but not nearby is too frequent a phenomenon for us to hold that the Catalina has sustained her burden of proof that this was not the reason her whistle was not heard on the Arbutus.

“We agree that the Catalina has not maintained her burden of proof that there was fault in the station or conduct of the Arbutus’ lookout.” 95 F.2d at 285-86.

Thus it is clear that the District Court erred in finding no adequate or stationed lookout on the UNION STAR as the Appellee did not sustain its burden of proof in this regard.

Even if there had been evidence of a lack of a properly stationed lookout who was specially designated as such, the District Court could not, on that basis alone, have found an inadequacy of lookout. In *Osaka Shosea Kaisha Ltd. v. Angelos, Leitch & Co.* (Atlas Maru-Elene) (4th Cir. 1962) 301 F.2d 59, 61, 1962 A.M.C. 1043, 1045-56, the Court, in holding that the lookout of the Atlas Maru was adequate even though there was no single person on the bow designated as lookout, said:

“It would be unfair and merely speculative to presume that the men on the bridge together with the five on the forecastle were not alert for the safe advance of their vessel. That was their intent and nothing else. . . .

“Moreover, beyond dispute the navigating officers of Atlas held Elene in eye constantly from the time Atlas was at Fort Carroll, some half hour before collision. All that was fairly observable, they observed. A crewman solely devoted to lookout could not have accomplished more. . . .”

3. Assuming, arguendo, a complete lack of lookout, the absence of such lookout would not be a fault unless such absence contributed to the collision.

Finally, even if the evidence had been clear that there was no proper and adequate lookout on board the UNION STAR, the law is clear that the absence of a proper lookout will not condemn a vessel, if it can be shown that the fault did not contribute to the collision.

The Fannie v. The Ellen Forrester (1871), 78 U.S. (11 Wall.) 238, 20 L. Ed. 114;

The Nacoochee v. Moseley (1890), 137 U.S. 309, 34 L. Ed. 687;

The George Murray (N.D. Ill. 1884), 22 Fed. 117;

The Mary Mosquito (E.D. Va. 1906), 145 Fed. 960;

The New York Central No. 22 (S.D.N.Y. 1903), 124 Fed. 750.

Appellant has clearly shown that UNION STAR could not and should not have been navigated in any other manner, even assuming that certain information known to her navigators was not so known.

In the case of *Me Victory*, 168 U.S. 410, 42 L. Ed. 519, the Circuit Court, 63 Fed. 631 at 638 (1894), had the following to say on the subject of the claim that the lookout was improper:

“It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting, and I think both steamers were at fault in not having had each a special lookout on duty; but in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the main bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stem. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine room would hardly have differed from those actually given if a lookout had been calling out to them what they both clearly saw and knew.”

In the leading case of *The Maria Martin v. Northern Transp. Co.* (1871), 79 U.S. (12 Wall.) 31, 20 L. Ed. 251, a collision occurred on the Detroit River between two vessels approaching on intersecting courses. In holding that the question of the incompetency of the steamer's lookout was immaterial where the other vessel was timely seen, the Supreme Court of the United States held:

“All three of the vessels—that is, the tug, the tow, and the steamer—had their signal lights properly displayed and the respective lights were burning brightly and were very easily distinguishable. Suggestion is made that the lookout of the steamer was incompetent, but the suggestion is entitled to no weight, even if it be well founded in fact, as the proof is entirely satis-

factory that the two colliding vessels were seen by each other in season to have taken every precaution to avoid a collision." 79 U.S. (12 Wall.) at 45, 20 L. Ed. at 254.

Thus it is satisfactorily and conclusively established from the foregoing authorities:

1. That the absence of a lookout on the bow is immaterial where the presence of the approaching vessel is timely and continuously observed by officers on the bridge.

2. That the absence of a lookout on the bow is immaterial where the presence of such lookout could not have availed to prevent a collision.

3. *A fortiori*, the failure of a stationed lookout to make a report to the bridge is immaterial where the report of the lookout could not have availed to prevent a collision.

In the instant case it is conclusively established that those on the UNION STAR saw the ILLINOIS continuously for a long period of time and at a considerable distance prior to the collision; and that there was nothing that any number of lookouts or lookout reports on the UNION STAR could have done to have prevented the collision.

It is therefore obvious that the UNION STAR has amply established that the absence of a bow lookout if such an absence could be found on the evidence, or the absence of reports from the stationed lookout was immaterial and did not in any manner contribute to the collision. Under these circumstances, and under the authorities heretofore cited, no fault can be found with the

UNION STAR in connection with its lookout. Consequently, the District Court erred in finding the UNION STAR at fault for failure to have a proper lookout.¹¹

III. THE TRIAL COURT ERRED IN FAILING TO RULE ON THE OTHER ALLEGATIONS OF FAULT IN THE RECORD AND DISCLOSED IN THE EVIDENCE WHEN THE ADMITTED RULE OF DAMAGES APPLICABLE WAS ONE OF APPORTIONMENT BASED UPON RELATIVE GRAVITY OF FAULT.

The parties stipulated that the law of South Viet Nam applicable to the collision between the UNION STAR and ILLINOIS on August 26, 1960, with respect to the measure of damage liability was as follows:

“1. If the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which committed the fault.

“2. If the two vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible

¹¹The cases cited by the District Court are inapplicable to the instant case. *The Madison* (2d Cir. 1918), 250 Fed. 850 involves a situation where the lookout failed to report an oncoming vessel which was obscured from the view of the master. It is, of course, obvious that it is the duty of the lookout to report those things which cannot be seen or heard by the master. In the instant case the master was aware of all vessels seen by the lookout. Similarly, *The Koyei Maru* (9th Cir. 1938) 96 F.2d 652 was a case where the night was murky and vision indistinct. The *Koyei Maru's* lookout in the bow did not report to the bridge the loom of a barge seen through the gloom. This is clearly distinguishable from the case at bar where vision was as clear to those on the bridge as to persons elsewhere on the ship. Thus the cases cited by the District Court are distinguishable and not relevant to this case.

to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be appointed equally.” (Tr 287:11-23)

The Court found as a fact that this quotation properly stated the applicable law of Viet Nam (Finding of Fact VIII—Record 91, 92). The Court further found as a fact that the collision took place in the territorial waters of South Viet Nam (Finding of Fact V—Record 4).

One of the most widely accepted of all “choice of law” rules has been that “The law of the place of the wrong determines whether a person has sustained legal injury.” (RESTATEMENT, CONFLICTS OF LAWS, Section 377 (1934)) This traditional position is reiterated by Goodrich, CONFLICT OF LAWS 3rd Ed. (1949) Section 92. This doctrine is clearly established in admiralty. *Lady Nelson, Ltd. v. Creole Petroleum Corp.* (S.D.N.Y. 1954) 1954 A.M.C. 1279, *aff’d* (2nd Cir. 1955) 224 F.2d 591, 1955 A.M.C. 1670; *Esso Standard Oil, S.A. v. S.S. Gasbras Sul* (S.D.N.Y. 1964) 239 F. Supp. 212. The *Lady Nelson* is particularly relevant to the case at bar. In that action, the only connection between the collision and the forum was the fact that the respondent was an American corporation. The collision occurred in the territorial waters of Trinidad. It was held that the law of Trinidad should govern the case and that damages arising out of a mutual fault collision in foreign territorial waters should be apportioned according to the local proportional fault law.

The District Court consequently was in error in deciding that “in the circumstances of this case it becomes unnecessary to pass upon” the “other specific . . . faults

advanced by libelant and respondent . . ." (Order—Record 87)

IV. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ILLINOIS WAS GUILTY OF SEVERAL SERIOUS FAULTS OF NAVIGATION.

- A. The ILLINOIS was guilty of a serious causative fault in failing to maintain adequate watch on the surrounding waters and particularly on the adjacent UNION STAR.**

The trial court found, correctly, that the ILLINOIS did not have a lookout properly stationed (Finding of Fact VI—Record 91). This was a serious and causative fault on the part of the ILLINOIS because no one informed the Captain of the maneuvers of the UNION STAR until the latter vessel was within 300 to 400 feet of the ILLINOIS (Tr 123:19-24). The UNION STAR was at that time reported to be moving at 2 to 3 knots (Tr 125:12-25; 126:1).

The last prior position of the UNION STAR that Captain Sorensen could recollect was a position three-tenths of a mile (1824 feet) away (Tr 115:7-10). There is a serious lack of watchfulness on the part of a vessel when another vessel in the near vicinity moves a distance equal to the length of five football fields without being observed and without the movement being reported to the navigator of the ILLINOIS. Failure to keep informed of the movements of the UNION STAR and commencing to depart from the pilot station without such information was a clear causative fault on the part of the ILLINOIS personnel. Had the Captain of the ILLINOIS been aware of the movements of the UNION STAR sooner and had

he considered them more clearly, it is probable that the collision would not have occurred. Captain Sorensen, had he considered the position and movement of the UNION STAR, would probably have delayed his move from the pilot station for another minute or two until the UNION STAR had passed upstream of his position. He would have waited because of his great concern about attempting to navigate the ILLINOIS south along departure range while facing astern to keep the range markers aligned.

Consequently, because Captain Sorensen did not receive any reports concerning the movements of the UNION STAR, he attempted a difficult maneuver in close proximity to the UNION STAR. Had the UNION STAR been allowed to pass by, Captain Sorensen's momentary confusion in his helm orders (see discussion under the heading *Explanation of the Navigation of the ILLINOIS* above) would have been an unimportant error which could have been easily corrected without threat to either vessel. However, since Captain Sorensen was unaware of the proximity of the UNION STAR, he attempted the maneuver when the latter vessel was close at hand. In this proximity, the effects of any slight error in movement are drastically more serious. Once the ILLINOIS started to move across the course of the UNION STAR, the collision was unavoidable.

The ILLINOIS was guilty of a serious causative fault in failing to provide Captain Sorensen with adequate information concerning the movements of vessels in the vicinity, both by failure to post a properly stationed and designated lookout and by the failure of the deck watch

of the ILLINOIS to keep watch of the movements of adjacent vessels and to report them to Captain Sorensen.

B. The Master of the ILLINOIS was guilty of a serious causative fault in attempting to perform a difficult maneuver in the close proximity of the UNION STAR.

As has been pointed out earlier (see discussion under the heading *Explanation of the Navigation of the ILLINOIS* above), the Master of the ILLINOIS, Captain Sorensen, was faced with a novel and difficult navigational task, i.e., to attempt to steer his ship down a range line marked by obscure range marks and bounded by wrecks and shoals on either side. In order to do this, he had to face astern¹² and give his commands while the ship moved forward. All of his commands had to be the reverse of the normal command for the situation.

He negligently attempted this difficult maneuver while the UNION STAR was in close proximity, moving slowly up the far east side of the channel.

The situation might best be analogized to attempting to back a large semi-trailer down a narrow alley by one who had previously only driven non-trailer trucks. The semi-trailer maneuvers in a somewhat similar way to that required of Captain Sorensen under these circumstances, i.e., the wheel must be put over in the opposite direction from that in which it is customarily put in a single chassis truck in order to turn. While one ought to get used to the

¹²When questioned about his position when he commenced his maneuvers, Captain Sorensen testified, in response to the question, "What direction were you facing?" "A. I was facing aft." "Q. Facing aft on the port wing of the bridge?" "A. Yes, that is, in other words, due north, due north." (Tr 122:13-17)

trick in short order, the first few movements might well be erroneous.

It would be clearly negligent for a novice on a semi-trailer to attempt to back it down a narrow street for the first time when another truck was coming up the other way. The prudent novice semi-trailer driver would wait for the other truck to pass before attempting this new and difficult task so that any errors of learning the technique would not hazard the safety of the vehicles.

We submit that it was a clear fault of judgment and an imprudent and negligent act on the part of Captain Sorensen to attempt to move the ILLINOIS onto the departure range line with the UNION STAR in close proximity.

- C. The ILLINOIS was solely at fault in the collision in turning to the east, into the edge of the channel up which the UNION STAR was moving and crossing the course of the UNION STAR.**

The noted American authority John Wheeler Griffin, in his definitive work *The American Law of Collision*, at 517 notes:

“[T]here are certain maneuvers which, from their very nature, cannot be governed by the ordinary rules designed for vessels on courses. Thus a vessel leaving a slip, before she has got on course; a vessel backing out from a pier and turning to get her heading; a vessel in maneuvering in leaving an anchorage or in taking a pilot—all are cases of special circumstances because the movements necessarily vary in every case and cannot be brought under general rules. It is evident to approaching craft what the vessel is doing, and both she and they must take whatever

action is prudent under the circumstances to avoid collision.”

In the case at bar, the special circumstances rule was applicable as to both vessels—one was maneuvering in leaving an anchorage and the other was dropping a pilot.

Speaking of a situation in which both vessels were subject to the special circumstances rule, it was said in *The Alaska* (S.D.N.Y. 1887), 33 Fed. 107, 111:

“No peremptory or precise rule exists, which defines how the duty of mutual cooperation is to be fulfilled. The conduct of both vessels is to be governed by the exercise of such good care and judgment, with reference to the particular circumstances, as would be exercised by prudent and skillful navigators under like conditions.”

Usages in particular localities must be considered in determining what action would be prudent under the special circumstances of the locality (Griffin, *The American Law of Collision*, 523). In the circumstances of the collision at bar, two usages are relevant in determining the prudence of the behavior of the vessels.

(1) The local usage, well known to navigators of the river, was that when the sea buoy off the Saigon River entrance was missing, the outgoing vessel would turn south after releasing her pilot and proceed along the previously discussed range line (Tr 207:5).

(2) It was also the custom for incoming vessels to get underway at slack water in order (a) to weigh anchor while the river current held their bows upstream and before the incoming flood tide swung them around to the south, making departure from anchorage upriver difficult in the narrow channel and (b) in order to proceed upriver on the flood tide (which was

particularly necessary for a heavily laden and slow vessel like the UNION STAR) (Tr 221:13).

In the instances where the Steering and Sailing Rules of the International Rules are superseded by special circumstances, each vessel must navigate in a manner which is safe and practicable under those circumstances in light of the local usages. Presumptively, it is safe and practicable to navigate on the starboard side. It is a general rule of admiralty apart from the precise dictates of the International Rules, that steam vessels approaching each other from generally opposite directions should, if necessary to avoid collision, put their helms over to cause them to move to starboard, and pass, port to port. *The Vanderbilt v. McKibbin* (1869) 73 U.S. (6 Wall.) 225, 230, 18 L. Ed. 823; *The Johnson v. McCord* (1870) 76 U.S. (9 Wall.) 146, 153, 19 L. Ed. 610. This is a general admiralty rule of prudence. It is the general rule to be followed in special circumstances in which it would be applicable. This rule was applicable to the circumstances surrounding the case at bar on August 26, 1960. The ILLINOIS was, by local custom as well as general prudential rules expected to direct her course southward from her position at the pilot station along the exit range. The UNION STAR, getting underway in accordance with local custom, to the east of the exit range, would have crossed the anticipated customary track of the ILLINOIS had the UNION STAR proceeded in any other direction than north-westward, as close to the eastern edge of the channel as possible and on a course which would pass upstream of the ILLINOIS' position. The UNION STAR thus took the customary and prudent course under the

circumstances. The UNION STAR kept to the far right (east) of the channel in order to pass, port to port. The ILLINOIS was expected to turn south from the pilot station and to stay on the range line. Instead, the ILLINOIS cut across the range line at almost a right angle and started to encroach upon the navigating area of the UNION STAR. The ILLINOIS was clearly at fault in so doing. The ILLINOIS neither followed the customary course nor remained on the prudential course which would cause it to pass the UNION STAR port to port.

The District Court erred in failing to find, on the basis of the evidence in this case, that the ILLINOIS was solely at fault.

V. THE LIBEL IS BARRED BY LACHES AND SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT.

The libel was filed by appellee on June 14, 1963, (R.1) twelve days short of two years, ten months from the date of the collision, which occurred on August 26, 1960. (Finding of Fact V, R.90-91).

The proper limitation period for damages arising out of a maritime collision is measured by laches. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (9th Cir. 1934) 73 F.2d 200; *Ronda Cia. Maritima, S.A. v. MV DAGALI* (S.D.N.Y. 1964) 239 F.Supp. 447, 1964 A.M.C. 2118; Gilmore and Black, *Law of Admiralty* (1957) p.630.

In applying the equitable doctrine of laches, the court looks to the analogous limitation period of the forum had the action arisen at common law. Gilmore and Black, *Law of Admiralty*, 296n; *Wells v. Simonds Abrasive Co.* (1953) 345 U.S. 514, 517, 97 L.Ed. 1211, 1215; *Brown v.*

Kayler (9th Cir. 1959) 273 F.2d 588. In so doing the Federal court looks to the conflict of laws rule of the forum state and applies the state's "borrowing statute", if there is one. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 85 L.Ed. 1477; *Ronda Cia. Maritima, S.A. v. MV DAGALI, supra*.

The State of California has a "borrowing statute" contained in Code of Civil Procedure § 361, which is applicable to this case and provides as follows:

When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

The parties have stipulated that the analogous period of limitations in Vietnamese law for filing an action for damages arising out of a ship collision is two years (Tr. 322:17-25) and appellee concedes tardy filing of the libel (Tr. 324:12-25)¹³ Accordingly, the analogous limitation period for the District Court in this case was two years.

¹³See also Finding of Fact XI (R. 92), which provides as follows:

"Respondent China Union Lines conducted an investigation of the collision shortly after it occurred and in July of 1961 security arrangements in the form of letters of undertaking were exchanged between libelant and respondent, which were followed by discussions and negotiations between proctors for libelant and proctors for respondent. In the circumstances the court finds that respondent China Union Lines, Ltd., was not prejudiced by States Steamship Company's delay in filing its libel and that States Steamship Company was not guilty of laches."

The laches doctrine does not provide a mechanical application of the analogous forum limitation period. The fact that the applicable limitations period has expired, however, places upon libelant the burden of proving *both* that respondent has not been prejudiced by the delay in filing *and* that libelant had a legally justifiable excuse for its delay in filing:

“Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury until the contrary is shown.” *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (9th Cir. 1934) 73 F.2d 200, 203.¹⁴

The following cases in this circuit, a sample of many, confirm these dual burdens of a libelant, such as *States Steamship Company* herein, who files beyond the analogous statutory period.

Brown v. Kayler (9th Cir. 1959) 273 F.2d 588.

Analogous state limitation period—two years. Suit brought four years after accident with only excuse that libelant was unfamiliar with legal matters. Dismissed on grounds of laches.

Wilson v. Northwest Marine Iron Works (9th Cir. 1954) 212 F.2d 510.

Maritime personal injury suit brought five years after accident. Analogous state statute was two years. Dismissed on ground of laches because no facts negativ-

¹⁴This case was followed by the Ninth Circuit on this point in the non-maritime case of *Whitman v. Walt Disney Prod. Inc.* (9th Cir. 1958) 263 F.2d 229.

ing prejudice were proved by libelant and evidence of actual prejudice to respondent was presented.

Westfall Larson & Co. v. Allman-Hubble Tug Boat Co. (9th Cir. 1934) 73 F.2d 200.

Ship collision on December 27, 1929. Libel filed August 10, 1933. Analogous state statute of limitations was three years. Dismissed on grounds of laches.

Carslund v. United States (N.D.Cal. 1950) 88 F. Supp. 105.

Personal injury libel filed more than one year after the injury occurred. Dismissed on grounds of laches by Judge Harris with leave to amend to negative prejudice and give reason for delay.

Loraine v. Coastwise Lines (N.D. Cal. 1949) 86 F. Supp. 336, 338.

Personal injury occurred on March 10, 1943. Action commenced on March 6, 1946. Analogous state limitations period was one year. Prejudice to defendant found by reason of unavailability of certain witnesses and libel dismissed on grounds of laches.

A. Appellant was prejudiced by reason of the delay by appellee in filing the libel.

The record contains numerous examples of prejudice to appellant by reason of the delay by appellee in filing.

1. Events in Viet Nam between August 26, 1960, date of the collision, and filing the libel on June 14, 1963, should be judicially noticed by this court. The investigation by appellant was severely affected by the war, which increased in scope, during the intervening period.

2. The unavailability of the helmsman, the watch officer and another potentially important witness of the vessel ILLINOIS. (Tr. 100:20-101:15). On the issue of damages the principal witness for appellee was unavailable by reason of his death shortly before the trial (Tr. 192:5-12). In *Ronda Cia. Maritima, S.A. v. MV DAGALI* (S.D.N.Y. 1964) 239 F. Supp. 447, 1964 A.M.C. 2118, the court emphasized the serious prejudice to respondent by reason of absence of testimony of persons, such as the *helmsman*.

3. In order for appellant, a Chinese company, to defend the action it was necessary for it to present all of the testimony of its officers and other witnesses, who are Chinese, by depositions taken several years after the event by reason of the delay of appellee in prosecuting the suit. As a result, the witnesses were, as in the case of *Wilson v. Northwest Marine Iron Works* (9th Cir. 1954) 212 F.2d 510, "hazy, vague and unclear" on several important points in issue. Because of the passage of time the Master of appellant's vessel UNION STAR, for example, testified in New York City at his deposition on June 19, 1964, without having the vessel's deck log book available to him, a most important and significant handicap to appellant's case. (Tr. 225-254; 259-286).

Appellant respectfully submits that the equitable presumption of prejudice to it by reason of the delay in filing the libel has clearly not been overcome by appellee.

B. There is no legal excuse for the delay by appellee in filing the libel and no evidence of an excuse was introduced.

When appellee amended its libel after its case had been concluded, the amendment made no allegation whatsoever

that appellee had an excuse for the delay. (Amendment to Libel, R.82-83). The record contains absolutely no evidence resembling an excuse by appellee for its admitted delay in filing the libel. The fact that security arrangements were exchanged by the parties (Tr. 330:14-20) is not evidence of an "excuse" for the delay in filing (although appellee apparently would have the court believe that it was) but rather is evidence that appellee was aware of the potential litigation and simply failed to act. Letters of undertaking were exchanged in the *MV DAGALI* case (S.D.N.Y. 1964) 239 F.Supp. 447, 1964 A.M.C. 2118, and this was specifically found by the court not to be evidence of a legally sufficient excuse for the delay in filing. See also *White v. United States Lines Co.* (D.Md. 1966) 254 F.Supp. 480.

The record in this case strongly supports appellant's defense of laches. Unfortunately the trial court concluded in the opening moments of trial that it did not favor a laches defense regardless of the evidence, and this defense obviously received no consideration.¹⁵

Apparently relying upon the trial court's disinterest in the laches defense, appellee made no effort whatsoever to present evidence to refute the defense of laches until after its case had closed, when its counsel conceded that

¹⁵The Court: When did you first take affirmative action with respect to your claim, the counterclaim and cross-libel?

Mr. Gillmar: It was almost concurrent.

The Court: Concurrent?

Mr. Gillmar: Just about.

Mr. Phillips: Of course, there is no question, Your Honor, that we knew about the matter when it occurred.

The Court: I'm not impressed by the laches, [sic.] Counsel. Let's pass that. (Tr. 16:15-17:2)

he had introduced no evidence on the point, that he had been under the incorrect belief that a three year limitations period would apply and sought permission of the court to reopen its case to attempt to rectify the deficiency in the record (Tr. 324:12-15). Appellant disputes that appellee properly introduced a single item of evidence relevant or admissible to refute the defense of laches. Appellee made statements in the record entirely unsupported by admissible evidence. (Tr. 329:18-334:15). Even conceding *arguendo* that what was presented by appellee constituted admissible evidence on the subject, no evidence relevant to legal excuse was introduced and appellee conceded that there was no waiver by appellant of the defense of laches. (Tr. 334:8-11).¹⁶

¹⁶Were there such a contention California Code of Civil Procedure § 360.5 would be applicable and the requirement that there be a written waiver by appellant would be unsatisfied. Section 360.5 provides:

No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title and no waiver executed after the expiration of such time shall be effective for a period exceeding four years from the date thereof, but any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver. Such waivers may be made successively. The provisions of this section shall not be applicable to any acknowledgment, promise or any form of waiver which is in writing and signed by the person obligated and given to any county to secure repayment of indigent aid or the repayment of moneys fraudulently or illegally obtained from the county.

VI. APPELLANT CANNOT BE HELD LIABLE FOR REPAIR COSTS TO APPELLEE'S VESSEL ILLINOIS GREATER THAN THE LOWEST COST OF REPAIRS AVAILABLE IN THE ORIENT.

The District Court awarded appellee the full \$40,053.60 repair bill of Puget Sound Bridge & Drydock Company¹⁷ (Finding of Fact X, R.92; Stipulation Re Damages, States Steamship Company, Item 9, R.85). Appellant offered to present testimony of appellee's own surveyor, Walter S. Martignoni, that repairs could have been accomplished in Japan, for example, at the time of the collision, for \$17,222 (Tr. 298:7-299:1). Mr. John V. Walsh, a qualified consulting engineer and ship surveyor, was called as a witness by appellant and an offer of proof was made that repair costs for the ILLINOIS not ex-

¹⁷The details of this bill are found in Res. Exhibit O, p. 10 as follows:

<i>Puget Sound Bridge & Drydock Company</i>	
Damage Repairs Bid (straight time) ..	\$29,428.00
Bonus Overtime	4,710.00
Additional damage repair work items ..	1,260.00
Drydocking charges for vessel and cargo:	
1½ days for vessel	\$2788.60
1½ days for cargo	1022.00
Facilities on dock	465.00
Towboats on and off dock	940.00
Pilot fee shifting vessel	120.00
	<hr/>
	5,335.00
	<hr/>
	\$40,733.60
Credits:	
Cancel insert No. 5 'tween deck	
aft bulkhead (Item 31-g)	120.00
Cancel "Dimetcote" (Item 32)	560.00
	<hr/>
	-680.00
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TOTAL	\$40,053.60
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ceeding \$15,000 could have been obtained in the Orient by a reasonable shipowner (Tr. 305:3-306:8). Appellee's objection to Mr. Walsh's testimony was sustained by the trial court on the ground of "irrelevance." (Tr. 306:5-8)

A. The injured party must do everything reasonable to minimize its damages.

It is a universally accepted principle of tort law that an injured party has an obligation not to exaggerate or inflame his damages, but, on the contrary, must do everything which may be reasonably expected of him to minimize his damages. The matter is summarized in the American Law Institute, *Restatement of Torts* § 918 as follows:

Section 918. Avoidable Consequences

(1) Except as stated in subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.

(2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended such harm or adverted to it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of such harm intentionally or heedlessly failed to protect his own interests.

McCormick, *The Law of Damages* 130, concludes that the injured party is under a disability to recover damages which have been increased due to his failure to take active steps to minimize his loss. Sedgwick confirms [1 Sedgwick, *Damages* §225 (1912)] that the claimant may

not recover for an avoidable loss. See also 25 C.J.S., *Damages* §§ 71, 91.

B. Exclusion of evidence by the trial court of repair costs available in the Orient at the time of the collision was reversible error.

The admiralty courts universally require that an injured party mitigate its damages. *Kossick v. United Fruit Co.* (1961) 365 U.S. 731, 737, 6 L.Ed.2d 56; see Roscoe, *The Measure of Damages in Actions of Maritime Collisions* 50. For this reason it has been held that a vessel must have its repair accomplished in the port providing the least expensive competent repairs. *Navigazione Libera T.S.A. v. Newton Creek Towing Co.* (2d Cir. 1938) 98 F. 2d 694, 697, 1938 A.M.C. 1419, 1423.

Following are decisions illustrating judicial application in admiralty of the requirement of mitigation of damages, all confirming that the trial court committed reversible error in excluding the testimony of John V. Walsh on grounds that it was "irrelevant."

Zeller Marine Corp. v. Nessa Corp. (2d Cir. 1948)
166 F.2d 32, 1948 A.M.C. 418.

A scow was damaged when a lift of girders fell to its deck. After findings by a Commissioner, the Court reviewed the question of whether the vessel need be restored "as good as new" by replacement of certain equipment or simply repaired so as to restore its market value without damaging its use. Judge Augustus Hand in ruling that the lesser repair cost was the proper item of damages concluded: "Any award must be calculated with recognition of the customary obligation of the injured party to minimize damages." (at p. 34).

The F. J. Luckenbach (E.D. Pa. 1929) 42 F.2d 279. The court in reviewing exceptions to a commissioner's report concluded: "There is another principle of the law common to the law maritime and common law. This is that the injured party may not exaggerate or inflame his damages, but, on the contrary, must do everything which may be reasonably expected of him to minimize his damages." (at p. 280).

Carolinian—San Clemente (N.D.Cal. 1943) 1943 A.M.C. 758.

Judge Goodman confirmed that the right of recovery may be defeated altogether if a shipowner fails to take proper steps to mitigate or reduce his damages.

Atkins v. Alabama Drydock & Shipbuilding Co. (S.D.Ala. 1961) 195 F.Supp. 944, 1961 A.M.C. 909.

The court disallowed certain repair expenses claimed by the shipowner on the grounds that there was no evidence that they were either necessary or reasonable to restore the vessel to its pre-collision condition.

Judicial application of the recognized duty of the injured party to mitigate damages recognizes the international character of shipping by finding that a shipowner may only recover the actual costs of repair or replacement parts if obtained in an available world port in which the price is lowest. In *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, 1938 A.M.C. 1419, the court held that the shipowner was required to buy a replacement propeller where the market cost was lowest, Trieste and not New York.

Appellant respectfully submits that the trial court's ruling that the testimony offered by appellant on the reasonableness of the repair costs of appellee was "irrelevant" was clearly erroneous and should be reversed with directions that appellee is entitled to include in its damages only the lowest repair costs reasonably available.

- C. The definition of the required standard of conduct by the shipowner in mitigating its damages is a question of law proper for review in this appeal.**

In numerous cases, the admiralty courts have held that the definition of the required standard of conduct of an injured party in mitigating its damages is a question of law. See *Ellerman Lines v. The PRESIDENT HARDING* (2d Cir. 1961) 288 F.2d 288, 291-292, citing numerous decisions in support of this proposition.

- D. The costs of repair to appellee's vessel Illinois incurred at the Puget Sound Bridge and Drydock Co. were unreasonable and should be stricken from appellee's damages.**

In the trial court appellant disputed the reasonableness of the Puget Sound Bridge & Drydock Company repair bill. (Stipulation of Damages, R.85:22-26). Appellant offered expert testimony challenging the reasonableness of appellee's cost of repair. (Tr. 298-299, 305-306). As concluded in *The Cape Friendship* (D.Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958, "... the burden of proving damages in all cases rests upon the party claiming to have sustained them, and it is the duty of the shipowner to take all reasonable actions to minimize the damages." (p.860) (Citing numerous decisions).

Appellee did not offer any testimony or evidence to sustain its burden of proof that the challenged repair cost item of damages was in fact reasonable, and this item of damages should therefore be stricken as a matter of law by this court from appellee's damages. *Carolinian—San Clemente* (N.D.Cal. 1943) 1943 A.M.C. 758.

VII. APPELLEE'S SUBSIDY CONTRACT WITH THE UNITED STATES GOVERNMENT IS NOT A DEFENSE TO APPELLEE'S FAILURE TO MINIMIZE ITS DAMAGES.

The District Court found that:

“At all relevant times the SS ILLINOIS was being operated by libelant States Steamship Company under the terms of an operating differential subsidy contract with the United States Government, the terms of which required that the ILLINOIS collision repairs be effected in a shipyard in the United States.” (Finding of Fact IX, R.92).

Appellee made no effort to refute appellant's contention that the repair cost of the ILLINOIS incurred at the Puget Sound Bridge & Drydock Company (Stipulation Re Damages, States Steamship Co., Item 9, R.85) was unreasonable and that appellee had failed to mitigate its damages. In response its sole defense was that its subsidy contract with the United States Government “required” that it repair its vessel in the United States. (Tr. 194:1-15; 195:15-25; 303:12; 304:25).

A. Neither appellee's subsidy contract nor the law of the United States required appellee to repair its vessel within the United States.

Title 46 United States Code § 1176 provides in pertinent part as follows:

(7) that whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 1155 of this title, except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage, and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an *emergency*. [Emphasis added]

Relevant sections of appellee's subsidy contract (Respondent's Exhibit R, 160:102 and 160:104-105) provide as follows:

Section II-4. *Use of United States goods.*

Whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 505(a) of the Act, except when it is necessary to purchase supplies and equipment outside the United States to enable any subsidized vessel to continue and complete her voyage; and the Operator shall perform repairs to any such vessel within the continental limits of the United States, except in an emergency.

. . .

Section II-6. *Maintenance and Repairs.*

(a) During the term of this agreement, the operator shall maintain each vessel and her machinery,

boilers, appurtenances, and spare parts in good order and condition and at all times maintain each vessel with full unexpired classification and other required certificates. With express permission of the United States, the operator may allow such classification certificates to expire during any idle or inactive period. Pursuant to the Rules and Regulations of the United States as from time to time amended the operator shall give due notice of the making of repairs or replacements in the United States, and shall afford United States adequate opportunity fully to inspect the items to be repaired and the proposed replacements. The United States shall cause such inspection to be made promptly in order to avoid undue delay in the sailing of any vessel. The United States may take such action as it deems advisable to ascertain that all repairs or replacements have been accomplished as specified. In making repairs, the operator shall use due diligence to minimize expense and shall comply with all rules and regulations, with respect to competitive bidding or other procedure, which the United States has adopted or may hereafter adopt in connection therewith.

The wording of the statute and the contract contemplate that repairs be accomplished outside the United States in cases of "emergency", and also that the expense in connection with repairs at all times be minimized.¹⁸ It is hard to think of any clearer "emergency" than repairs after a ship collision.

¹⁸Contract Section II-6 provides in part:

"In making repairs, the operator shall use due diligence to minimize expense and shall comply with all rules and regulations with respect to competitive bidding or other procedure which the United States has adopted or may hereafter adopt in connection therewith."

- B. The legislative history of section 1176(7) of Title 46 United States Code does not support appellee's contention that it was "required" to repair in the United States.**

Subpart (7) of section 1176 of the Merchant Marine Act of 1936 [46 U.S.C. § 1176] provides:

(7) That whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States as defined in section 1155 of this title, *except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage*, and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an *emergency*. [Emphasis added]

No part of the Congressional debate or hearings on this section supports appellee's contention in the trial court that the ship subsidy law *bound* appellee to repair its vessel in the United States *regardless of cost*. The legislation, it is true, was intended to protect American labor by subsidizing 75% of the expenses of American operators over foreign expenses wherever practicable so that vessel construction and repairs would ordinarily be performed in the United States but it was recognized that "emergency" circumstances would justify repairs outside of the United States or the legislation would be self-defeating:

"There are many instances where, in a foreign land, or even here, there would be facilities for the repair of subsidized vessels, and it might happen that an independent concern, a small owner, might wish to make use of those facilities. If there are any profits, they are all used anyway in liquidating the loan on

the debt or the advances made to the subsidized ships; but our thought in formulating the language was that these facilities ought to be used by anybody who cared to make use of them."

Remarks of Mr. Copeland. 80 Cong.Rec. 1069 (1936)

C. Even if Title 46 United States Code § 1176(7) or appellee's subsidy contract required appellee to repair its vessel in the United States, appellant cannot be held to respond in damages for greater repair costs than were available in the Orient.

Although it is correct that under certain circumstances, the injured party cannot be held to act to mitigate his damages in violation of his contractual duties to a third person, it is equally true that an alleged wrongdoer, such as appellant, cannot be held to the consequences of greater damages as a result of the injured party's voluntary act, such as entering into a subsidy contract. Appellee's situation is comparable to the time charterer who had no right to recover from a drydock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semiannual drydocking required by the charter party. In that case, Mr. Justice Holmes ruled that:

"... a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."
Robins Dry Dock & Repair Co. v. Flint (1927) 275 U.S. 303, 309, 72 L.Ed. 290, 292.

The position of appellant is comparable to the alleged wrongdoer in the case of *Hadley v. Baxendale*, 9 Ex. 341,

156 Eng. Rept. 145 (1854), in which the Court of Exchequer found that the breaching party could not be held to damages beyond the reasonable contemplation of the parties upon entering into a contract. There is, of course, no contractual relationship between the parties here but, as the Supreme Court has emphasized, the full scope of the admiralty rule of damages must prevail over contrary provision and the absence of a contractual relationship between the parties is not conclusive. *Weyerhaeuser S.S. Co. v. United States* (1963) 372 U.S. 597, 603, 10 L. Ed.2d 1, 6. That principle should apply herein to exclude the excessive damage repair costs of appellee.

- D. If appellee is permitted damages based upon repair costs incurred in the United States rather than lower costs available in the Orient by reason of its subsidy contract with the government of the United States, the Constitution of the United States and the Treaty of Friendship, Commerce and Navigation between the United States of America and China will be violated.**

The Constitution of the United States provides that treaties entered into by the United States Government are the supreme law of the land. *Constitution of the United States*, Article VI, clause 2. Treaties entered into after the enactment of a Congressional Act, such as the Merchant Marine Act of 1936 (46 U.S.C.A. § 1171 *et seq.*), upon which appellee relied below in arguing it was bound to repair in the United States (Tr. 193:10-15; 195:15-18) was therefore superseded, to the extent inconsistent, by the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948] T.I.A.S. No. 1871; *Cook v. United States*, 288 U.S.

102, 118, 77 L.Ed. 641, 649 (1933). That treaty provides for national treatment for all Chinese vessels, as follows:

“The vessels and cargoes of either High Contracting Party shall, within the ports, places and waters of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party, irrespective of the port of departure or the port of destination of the vessel, and irrespective of the origin or the destination of the cargo.” Article XXII, para. 1

The Merchant Marine Act of 1936 provides subsidies for qualifying American vessels in return for the owners compliance with certain conditions. See 46 U.S.C.A. §§ 1171-1182. The subsidies were available to the ILLINOIS, but of course not available to the UNION STAR, a Republic of China vessel (Finding of Fact II, R.89). Under the terms of the treaty the UNION STAR should not therefore be held to respond in damages for the exorbitant cost of repairs to the ILLINOIS incurred by repairing in an American shipyard if the court should find that such repair was necessitated by appellee's contract and the Merchant Marine Act of 1936.

VIII. COST OF DRYDOCKING THE VESSEL ILLINOIS SHOULD BE DEDUCTED FROM THE DAMAGES ALLOWED APPELLEE.

Appellee's repair bill at Puget Sound Bridge & Drydock Co. (contained in Stipulation of Damages, States Steamship Co., Item 9, R.85) includes costs of drydocking

the vessel in the sum of \$5335.00.¹⁹ This item was included by the court in the damages divided between the vessels. [Findings of Fact X, R.92 pursuant to Stipulation Re Damages R.85].

Appellant presented testimony of expert witness John V. Walsh disputing the necessity of drydocking the vessel (Tr. 308:2; 312:23; 317:2-19) to accomplish the repairs. Mr. Walsh testified that location of the damage to the hull was such that with a minimum of ballast the necessary repairs could have been safely accomplished without the necessity of the exorbitant drydocking expense (Tr. 310:23; 312:13). He testified that approximately 25% of the repairs that were accomplished at the time of drydocking (set forth in Respondent's Exhibit "O") were unrelated to those arising from this collision (Tr. 317:20; 318:2) and concluded that drydocking might easily have been necessary by reason of repairs or maintenance unrelated to collision damages.

Appellee offered no rebuttal testimony to justify its claim of necessity in drydocking its vessel and appellant has disputed the reasonableness in all respects of the Puget Sound Bridge & Drydock Co. bill (R.85:22-26). The burden of proving the reasonableness of its vessel repair

¹⁹The following items of the bill relate to drydocking:

Drydocking charges for vessel and cargo:

1½ days for vessel	\$2788.60
1½ days for cargo	1022.00
Facilities on dock	465.00
Towboats on and off dock	940.00
Pilot fee shifting vessel	120.00

\$5,335.00

costs rested on appellee. *The Cape Friendship* (D.Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958; *Atkins v. Alabama Drydock & Shipbuilding Co.* (S.D. Ala. 1961), 195 F.Supp. 944, 1961 A.M.C. 909. Appellee's failure to sustain this burden should result in loss of the cost of drydocking from the allowable damages and the decree of the District Court should be so revised. *Carolinian-San Clemente* (N.D. Cal. 1943) 1943 A.M.C. 758.

CONCLUSION

For the foregoing reasons and upon the entire record, we respectfully submit that the District Court plainly erred and that the decree of the District Court should be stricken and the Libel dismissed or in the alternative this Court should modify the decree of the District Court so as to hold the ILLINOIS solely to blame for the collision and resulting damage and to exonerate the UNION STAR from all liability or in the alternative modify the Decree by striking the ILLINOIS repair cost of \$40,053.60 or its drydocking cost of \$5,335.00.

Dated, San Francisco, California,

September 28, 1966.

Respectfully submitted,

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CERTIFICATE UNDER RULE 18

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By STANLEY F. GILLMAR
Of Attorneys for Appellant
China Union Lines

(Appendices Follow)

Appendices.

No. 20,920

IN THE

United States Court of Appeals
For the Ninth Circuit

CHINA UNION LINES, LTD.,
a corporation,

Appellant,

vs.

STATES STEAMSHIP COMPANY,
a corporation,

Appellee.

BRIEF FOR APPELLEE

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No. 20,920

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHINA UNION LINES, LTD.,
a corporation,

vs.

STATES STEAMSHIP COMPANY,
a corporation,

Appellant,

Appellee.

BRIEF FOR APPELLEE

I. INTRODUCTION

At the trial of this case States Steamship Company and China Union Lines each vigorously asserted the other was solely at fault for the collision. In its memorandum opinion and findings of fact the district court resolved this dispute, and the conflicts in the evidence, by finding that fault on the part of each vessel contributed in equal measure to the collision, and a decree of mutual fault was entered against both parties.¹

¹It should be noted that the Findings of Fact and Conclusions of Law incorporated all suggestions made by appellant and were entered without objection by appellant.

Many of the factual and legal contentions urged by appellant in the district court have been abandoned on appeal and new contentions substituted. In its opening brief appellant urges this court to consider these factual contentions *de novo* in the hope that this court may evaluate the case differently than did the district judge and, hopefully, with a different result. (AOB 32-34.)

Since 1954, when the Supreme Court decided *McAllister v. United States*, 348 U.S. 19 (1954), this court has repeatedly held that "the ghost of trial *de novo* in this intermediate appellate court has been laid to rest . . ." (*The President Van Buren*, 223 F.2d 853, 855 (9th Cir. 1955); see also *Peterson v. United States*, 224 F.2d 748, 749 (9th Cir. 1955).) Accordingly, appellant misapprehends the law when it implies that the concept of trial *de novo* should govern this appeal. As the Supreme Court said in *McAllister v. United States*, *supra*, and as this court said in *Benton v. United Towing Co.*, 224 F.2d 558 (9th Cir. 1955), "'Findings of fact shall not be set aside unless clearly erroneous . . .'"

Appellee is confident that the record in this case so clearly supports the trial court's finding of fault on the part of the *Union Star* that a trial *de novo* could suggest no other result. Nonetheless, it would seem improper that appellant's suggestion of a trial *de novo* be received without comment.

II. JURISDICTION

Jurisdiction in the District Court arose under 28 U.S.C. 1333, and jurisdiction to review the judgment is conferred upon the Court of Appeals by 28 U.S.C. 1291 and 1294.

III. STATEMENT OF THE CASE

A. THE ILLINOIS' POSITION NEAR THE KORHYU WRECK BUOY.

The *Illinois*, a 455 foot vessel operated by appellee, left the city of Saigon at about 0800 on August 26, 1960, and proceeded down the Saigon River on its way to sea. (Ex. 3.) A Saigon River pilot, Phan Hu Hai, was piloting the vessel, and before going to sea it would be necessary to drop him off at the pilot station near the Korhyu Buoy. Upon leaving the mouth of the Saigon River the *Illinois* entered Ganh Rai Bay on a southeasterly course (143°) (Tr 29:13-24). When abeam of the Kunnigawa Buoy the *Illinois* turned south and proceeded on course 180° (Tr 29:24-30:1) until she was approximately one mile off and abeam of Cape Eperon. At this time (1128) (Ex 5) course was changed to 150° and speed was reduced to slow ahead. (Tr 31:15-32:15.) The *Illinois* continued slow ahead on course 150° for about two minutes, during which time Pilot Hai observed a vessel (later identified as the *Union Star*) anchored between the Korhyu Buoy and the Kontom Buoy (Tr. 35:21-36:1), but to the west of a line between them. After continuing slowly ahead on course 150° for about two minutes the *Illinois*, at 1130, changed course to 145°, and at 1133, while proceeding on that course, her engines were stopped (Tr. 33:18-19, Ex. 5), so that she could drift to a position dead in the water near the pilot station and the safe exit range where Pilot Hai would disembark. The *Illinois* stopped dead in the water about 400 meters (437.5 yards) northwest of the Korhyu wreck buoy. (Tr. 27:6-8.) This was probably about 1136, i.e., several minutes after 1133 when her engines were stopped (Ex. 5) and a few minutes before Pilot Hai disembarked.

(Exs. 3, 5.) Before leaving the vessel Pilot Hai went into the chart room with the *Illinois*' master, Captain Sorensen, and there described and drew upon a chart the recommended range line which the *Illinois* should follow in the absence of the departure buoy. (Tr. 34:9-13; 42:25-43:4; Ex. 4.)

The *Illinois*' position 400 meters northwest of the Korhyu wreck buoy was the natural result of the courses previously steered. These courses (180° from the Kumi-gawa buoy then, when abeam Cape Eperon, 150° for two minutes, then 145° until dead in the water) were the customary courses steered by all Saigon pilots in approaching the pilot station and departure range. Captain Sorensen referred to them as "pilot courses". (Tr. 150:19.) Pilot Dy of the *Union Star* repeatedly referred to the various headings of the *Illinois* as 180°, 150° or 145°. (Tr. 205:25; 206:15.) The absolute accuracy of these estimates can only be explained if these courses were steered by every vessel approaching the pilot disembarkation station and departure range. The significance of this fact is that in coming to rest at this position and thereafter proceeding to sea on the departure range the *Illinois* was following a well-established and predictable sequence of actions, which were, or should have been, obvious to the *Union Star*'s navigators, and in particular her pilot.

B. THE UNION STAR'S ANCHORAGE POSITION.

The *Union Star*, having arrived earlier that morning, was anchored west of the Nui Vung Tau Lighthouse. The precise anchorage position is difficult to locate with certainty since (1) her log states that she anchored 1.2 miles

due west of the lighthouse (Ex. J), (2) her master claims she anchored exactly one mile west of the lighthouse (Tr. 228:4-8), and (3) her pilot testified that her anchorage position when he boarded was 10° , 10 minutes north, 107° , 3 minutes, 1 second east (Tr. 202:4-9), *i.e.*, about 1.26 miles west of the lighthouse. These apparently slight differences in even the claimed position of the *Union Star* result in a somewhat different relationship between her and the *Illinois* when the *Illinois* later arrived on the scene. These differences are significant only because the vessels were quite close (about .6 of a mile apart) when they started moving toward one another and they therefore found themselves maneuvering in very close quarters, where seemingly small changes in estimated angles of approach could substantially affect their navigation.

In finding that the *Union Star* was anchored 1.2 or 1.3 miles from the lighthouse the district court, in effect, accepted the *Union Star's* testimony and compromised its internal conflicts. In doing so the court ignored the estimates of the *Union Star's* position given by *Illinois* personnel which were given in terms of distance and bearing from the *Illinois*. Since the *Illinois's* own position and heading changed from time to time, the position of the *Union Star* according to these estimates could be ascertained only by first determining the heading and location of the *Illinois* at the reference time for each estimate. The district judge may have felt that such estimates of the *Union Star's* anchorage position were necessarily imprecise and so accepted instead the anchorage position reflected by the *Union Star's* log and the testimony of her pilot.

In the event it remains of interest to the court, the *Illinois'* master, Captain Sorensen, testified that he saw the *Union Star* bearing about 215° true about .3 of a mile distant just before he got under way at 1140. (Tr. 117:24-118:5.) Second Mate McCarthy said that just before he left the bridge to go to lunch he saw the *Union Star* about 10°-20° on the starboard bow from one half to one mile away.² Thus, both Captain Sorensen and Chief Mate McCarthy placed the *Union Star* a few hundred yards to the west of the departure range (rather than to the east of it as appellant claims) and several hundred yards north of the anchorage position claimed by appellant. From all of this it will be noted that there is conflict and inconsistency to some extent between *all* witnesses regarding the *Union Star's* anchorage position, which was resolved by the district court as above noted. It is not necessary to quarrel with the district court's findings in order to demonstrate the *Union Star's* liability, and appellee accepts that finding for the purposes of this appeal.

C. THE HEADINGS OF TWO VESSELS AS THEY COMMENCED MANEUVERING TOWARD ONE ANOTHER.

Accepting for the purposes of argument the positions of the two vessels as claimed by appellant, there remains only to ascertain their headings at the time the *Union Star* got under way. As to the *Union Star*, her pilot testified that her heading when she got under way was

²Since the *Illinois* changed course at 1128 from 180° to 150° when abeam of Cape Eperon (Ex. 5; Tr. 31:15-32:16), and since McCarthy went to lunch at 1130 (Tr. 69:1), and since he testified that his observation of the *Union Star* was made when the *Illinois* was abeam or south of Cape Eperon (Tr. 70:14-21), it is quite proper to assume that the *Illinois* was on course at 150° at this time, and not on course 180°, as appellants have suggested (AOB 21).

“obviously” north northwest ($337\frac{1}{2}^{\circ}$).³ As to the *Illinois*, the last course steered before she came to a stop was 145° (Tr. 39:24-40:2), and, at the time the *Union Star* got under way, she was probably still near this heading, although a few minutes later her bow had drifted south to a southerly heading (Tr. 120:12-13; 116:7-18). Thus, when the *Union Star* got under way at 1137, the *Union Star* was headed north northwest ($337\frac{1}{2}^{\circ}$) and the *Illinois* was headed about 145° true and the two vessels were therefore on almost reciprocal courses, there being a discrepancy of only 12° to 13° . The vessels were about a half mile apart at this point.

D. UNION STAR'S MANEUVERS.

According to her pilot, the *Union Star*, after getting under way at 1136 or 1137 (Exs. M, N), came to course 348° and maintained this course for three minutes, after which course was altered to 353° (Tr. 210:7-11). This first three minutes is critical since it brings the *Union Star* to 1140 which was the time that Captain Sorensen ordered full ahead (Ex. 5) after watching the pilot boat leave with the *Illinois*' pilot. At this point, the vessels would necessarily have been about 500 to 600 yards apart, with the *Union Star*, as long as she was still on course 348° , headed directly for the *Illinois*.

³Appellant quarrels with the use of the word “obviously”, suggesting that this is an inaccurate translation from the French. (AOB 6.) Since this translation was procured by appellant's counsel and thereafter approved by appellee's translators we question the propriety of now attempting to change the connotations of the translation *ad hoc*. The translation suggested by appellant on appeal should not differ from that which it urged in the district court. This observation applies also to all instances in appellant's opening brief where it attempts to strengthen its position by suggesting, for the first time, that its own translation is incorrect.

With regard to the *Illinois'* headings and maneuvers, it is undisputed that the last course ordered before the *Illinois* drifted to a stop dead in the water was 145°. (AOB 6.) Since she still had some slight headway until about 1135 (Tr. 150:8-13), the *Illinois* had probably not drifted too far from this heading at the time the *Union Star* got underway at 1137 (Ex. M). A few minutes later (1140) when Captain Sorensen ordered the *Illinois'* engines full ahead (Ex. 5) to depart from the pilot station on the departure range line, the *Illinois* was headed in a southerly direction. Captain Sorensen estimated her heading at this time (1140) to be about 180° to 185° (Tr. 120:12-13; 116:7-18). Although this southerly heading is now vigorously disputed by appellant, it was admitted at one point by Captain Hu of the *Union Star* when he said that one minute before the collision (when the *Union Star* went full astern at 1142) the *Illinois* was heading southerly (Tr. 270:22-24). Captain Sorensen attributed the change in the *Illinois'* heading from 145° to 180° to the effects of wind and current (Tr. 150:16-151:2). Certainly, this is the logical explanation for this change in heading since it is normal to have varying current eddies when the tide is changing as it was at this time. (Tr. 149:10-15.) In fact, the *Union Star's* own heading changed from north (Tr. 254:4) when she anchored to north northwest at the time she weighed anchor (Tr. 230:20-231:14), a change of 22½° which could only be due to the then commencing change of tide.⁴

⁴Captain Hu testified "Tide almost slacking to flood a little, almost slacking to flood". (Tr 246:14-15.) The *Illinois'* Second Mate, Mr. McCarthy, said the current ". . . was on the change, starting to flood". (Tr 67:10.) Pilot Dy of the *Union Star* said in his report of August 27, 1960 that the water was "agitated". (Ex D.)

Certainly reason insists that the *Illinois* was headed south at 1140 since if she were still on course 145° , there could be no reason whatever for the *Illinois* to turn left and thereby approach the 182° departure range at an even greater angle than 145° . If he were still on course 145° , Captain Sorensen's first course change would have been to the right in the general direction of his destination and alignment with the 182° departure range. For the *Illinois* to have turned left from 145° would have been an incredibly senseless and dangerous maneuver since it would have resulted in the *Illinois*' intersecting the departure range at an extremely broad angle on a heading directly toward the Korhyu wreck zone. The *Illinois*' slight and gradual turn to the left could be explained only if in fact she were heading south at the time she initiated it.

Parenthetically, appellee should note that both Captain Hu and Pilot Dy realized that their version of the collision would require their assertion of such a senseless and pointless turn. In support of this claim, Captain Hu also claimed that the *Illinois* went from a position two miles and two points on the *Union Star*'s port bow (Tr. 261:22-262:10) at 1137 (Ex. M) to the point of collision six minutes later. This would require the *Illinois*, which was incapable of such speed (Tr. 129:5-10), to have pursued a suicidal left turn at a speed of 20 knots for the entire distance to the point of collision. Captain Hu and Pilot Dy fully discussed the matter before either of them prepared a report to his superior (Tr. 274:10-16), and Pilot Dy's testimony was only slightly more conservative. He estimated that the *Illinois* approached and crossed the departure range at right angles at a speed of 12 or 13

knots headed straight for the Korhyu wreck buoy. (Tr. 212:2-20.) Actually, the *Illinois* was only moving at 3 knots maximum before she stopped her engines. (Tr. 131:14-15; Ex. 5.) Both Captain Hu and Pilot Dy must have been aware that they could not justify their own maneuvers unless they could convince their superiors that the *Illinois* engaged in such a suicidal and impossible maneuver. Realizing that no one would believe such conduct possible of a rational navigator, Captain Hu at one point attempted to suggest that Captain Sorensen was drunk at the time. (Tr. 244:11-15.) This suggestion has been quietly abandoned since it was completely refuted by the testimony of not only Captain Sorensen but also the two pilots who were with him at different times before and after the collision. (Tr. 51:4-17; 215:17-19.)

Being aware that a high speed left turn by the *Illinois* toward the Korhyu buoy is simply incredible under the circumstances, but being also aware that its version of the collision depends upon acceptance of such a turn, appellant has devoted a substantial portion of its opening brief to the hypothesis that maneuvering the *Illinois* onto the departure range presented the same difficulty as backing a trailer truck, and that Captain Sorensen, like an inexperienced truck driver, ordered left rudder when he intended to order right rudder. (AOB 23-27; 51-52.) This hypothesis, born solely of desperation and a fertile imagination, is as specious as was the earlier suggestion that Captain Sorensen had been drinking. Captain Sorensen has had an American master's license since 1943 and before that a Danish license. He has served with States Line for over twenty years. (Tr. 102:5-20.) He has been

in and out of Saigon thirty to forty times, and, as Pilot Hai put it, is “. . . an old timer on the line.” (Tr. 27:19.) He was not only familiar with the departure range (Tr. 110:4-5) but was familiar with all the local landmarks. To Captain Sorensen it was “just like looking across the street”. (Tr. 119:1-3.) The use of entrance and departure range lines is too common an occurrence throughout the world to have confused a master of Captain Sorensen’s experience, and there is no support in the record whatever for appellant’s assertion (AOB 23) that this particular range caused Captain Sorensen difficulty or that he was confronted with an unusual or difficult problem in navigating with reference to landmarks astern.⁵

Discarding the probability of a suicidal high speed left turn from a point west of the *Union Star* across her bow and into collision, and recognizing that Captain Sorensen was an experienced and rational master, it follows that the *Illinois* was, as Captain Sorensen testified, very close (100 feet) to the departure range line (Tr. 119:4-13) (and 400 meters west of the Korhyu Wreck Buoy) and headed south when, at 1140, he got under way and ordered left

⁵The court will note the lack of transcript references in connection with this portion of appellant’s brief. (AOB 23-27, 49-50.) In addition, it should be noted that (1) the footnoted contention appearing on page 25 of appellant’s brief is in no way supported by the transcript reference given and (2) in connection with its observation (AOB 26) that Captain Sorensen did not immediately serve a note of protest on Captain Hu, appellant has not (with good reason) asserted that there is any custom or practice among American masters to do so before consulting owners’ attorneys; (3) appellant’s reference (AOB 26) to appellee’s objection to the obtaining of Pilot Hai’s testimony is false—appellee *excepted* to various questions and the form thereof propounded by appellant. Finally, with regard to the absence of additional witnesses having knowledge of the details of the *Illinois*’ navigation (AOB 26) appellant has not (again with good reason) asserted there were any such witnesses.

rudder in order to position the *Illinois* on the departure range line. It was after he had blown a two-blast signal indicating this initial left turn that he heard the one-blast signal from the *Union Star* and saw her headed directly toward the *Illinois* (Tr. 122:7-123:7). Captain Sorensen thereupon ordered hard left rudder in an attempt to parallel the *Union Star's* course.

The sequence of these events can be reconstructed as follows: The *Illinois'* pilot left the bridge at 1138 (Tr. 148:20), descended to the main deck and went over the side into the pilot boat, which departed from the *Illinois'* port side at 1139. (Tr. 106:6; Exs. 3 and 5.) After seeing the pilot boat depart Captain Sorensen walked over to the starboard wing of the bridge to check on the position of the *Union Star* (Tr. 120:2-3) (which unknown to him had gotten under way 2 to 2½ minutes earlier while he and Pilot Hai were still in the chart room laying out the departure range line). When Captain Sorensen got to the starboard wing of the bridge he saw the *Union Star* about 3/10 of a mile away (Tr. 114:14-115:3) with her anchor chain still in the water and her anchor ball still hoisted (Tr. 118:6-15). This portion of Captain Sorensen's testimony was confirmed by Seaman Dobas who also saw the *Union Star* at that time with her anchor chain in the water and her anchor ball still aloft. (Tr. 91:5-24.) Pilot Hai also saw the *Union Star's* anchor ball before he left the bridge at 1138. (Tr. 43:15-20.) After ascertaining the position of the *Union Star*, Captain Sorensen, at 1140, went full ahead on his engines (Ex. 5) and ordered "a couple of degrees" left turn. (Tr. 121:11-18.) It was approximately at this time that the *Union Star* claims to have altered course from 348° to 353°, yet no one-blast

signal was heard until after the *Illinois* blew two blasts and started her gradual turn to the left. (Tr. 122:7-11.) It will be shown that it was not the *Union Star*'s turn from 348° to 353° which was signalled, but a later turn. In any event, after thus checking on the *Union Star* Captain Sorensen ordered full ahead and ordered the helmsman to "come left a little—just a couple of degrees", blowing a two-blast whistle signal at the same time. (Tr. 121:5-18.) He then walked back to the port wing of the bridge to ascertain his alignment with the departure range. (Tr. 121:16-22.) This all happened at 1140, according to the *Illinois*' deck bell book (Ex. 5), and this is confirmed by the *Union Star*'s testimony that three minutes after 1136½ or 1137 (when the *Union Star* got under way) the *Union Star* changed course from 348° to 353° in order to pass between the *Illinois* and the Korhyu Wreck Buoy. (Tr. 210:7-13.) Captain Hu and Pilot Dy evidently did not realize when they made this small turn that the *Illinois* was beginning to move ahead. The *Union Star*'s pilot was watching landmarks (Tr. 220:23-221:2) and, no doubt, also lining himself up with reference to various navigation buoys. In any event, as soon as the *Illinois* blew her two-blast signal at 1140 the *Union Star*'s navigators' attention was then particularly drawn to the *Illinois*, and they certainly then became aware that the *Illinois* was under way and turning left. At that moment the *Union Star* made the unfortunate decision to make an additional turn to starboard in order to force a port to port passing and squeeze between the *Illinois* and the Korhyu Wreck Buoy. The vessels were, however, too close for this maneuver to be carried out, which Captain Sorensen realized when he heard the *Union Star*'s one-blast

signal, indicating to him that the *Union Star* had turned to a collision course. He, accordingly, ordered a left turn so that both vessels were headed in the same direction. Despite this maneuver, the vessels scraped each other as they came alongside on almost parallel courses.

IV. ARGUMENT

A. PRELIMINARY COMMENT

In its cross-libel appellant asserted that the Narrow Channel Rule governed the navigation of the *Union Star* and the *Illinois*, and charged the *Illinois* with fault for having failed to pass port to port. (Cross-libel, p. 5, paras. 5, 6 and 7.) During all of the proceedings before the district court appellant continued to rely on the Narrow Channel Rule as justification for its maneuvers. On the other hand, appellee asserted that the vessels were governed by the Special Circumstances Rule⁶ because the vessels were navigating at the time of the collision in an area which was both an anchorage and a pilot station, where outgoing and incoming vessels had to stop and discharge or take aboard pilots, maneuvering as necessary to accomplish this purpose. Such circumstances invoke application of the Special Circumstances Rule.⁷

⁶33 U.S.C.A. § 1089:

"In obeying and construing sections 1078-1089 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

⁷*Arfeld-Lacuna*, 42 F. 2d 745 at p. 748 (D.C. La. 1930); *Port Adelaide-Julesburg*, 181 F. 2d 365 at p. 366 (2d Cir. 1950); *Darby-Soya Atlantic*, 213 F. Supp. 7 at p. 24 (D.C. Md. 1963); *Skibs Aktieselskapet Orenor v. The Audrey*, 181 F. Supp. 697 at 702 (E.D. Va. 1960), *affirmed*, 287 F. 2d 706.

Appellant has now abandoned its contention that the two vessels were governed by the Narrow Channel Rule, and its opening brief indicates that it is now in agreement that the Special Circumstances Rule was applicable. (AOB 52-53.) In employing the Special Circumstances Rule particular note should be taken that the area where the collision occurred was one where vessels were required and expected to maneuver on a variety of headings and speeds, and other vessels, realizing the nature and purpose of the anchorage, were required to maneuver with caution in anticipation of such maneuvers as circumstances might require. It should also be noted that one of the circumstances then existing was the absence of the departure buoy. The consequence of this missing buoy was the requirement that departing vessels proceed to sea on the departure range described by Pilot Hai. The *Union Star's* pilot knew of this requirement and should have expected the *Illinois* to maneuver onto this range line after dropping her pilot. However, disregarding these special circumstances and the required maneuvers of the *Illinois*, the *Union Star* blindly and determinedly maneuvered so as to squeeze between the *Illinois* and the Korhyu Wreck Buoy. As events developed this meant that the vessels found themselves maneuvering in opposite directions and in extremely close quarters. The unfortunate result was foreseeable.

**B. THE DIAGRAM ATTACHED TO APPELLANT'S
OPENING BRIEF (APPENDIX B)**

In the diagram attached to appellant's opening brief there is drawn what purports to be the 182° departure range line. This "safe exit" departure range was described by Pilot Hai as a 182° line drawn from Nui Ba Lai 50 meters on Point Vung.⁸ (Tr. 34:9-13.) Pilot Dy described the line as 182° from the 164 ft. summit and tangent to Point Vung.

In depicting this departure range line on the diagram (Appendix B) appellant has actually drawn a 183° line instead of a 182° line. This, of course, has the effect of widening the space between the departure range line and the Korhyu Wreck Buoy and, in effect, suggesting more room between the *Illinois* and the buoy than actually existed. In order to correct this error appellee has correctly depicted the 182° departure range on the chart which is attached hereto as Appendix A.

C. SPECIFIC FAULTS COMMITTED BY THE MV UNION STAR

1. The UNION STAR failed to maintain an adequate lookout.

In its Findings of Fact and in its Memorandum Opinion the District Court placed particular emphasis on the failure of each vessel to maintain an adequate lookout.⁹

⁸Actually, there is general agreement that Pilot Hai was referring to the 164 ft. knoll or summit which is adjacent and to the west of Nui Ba Lai. (Tr 206:24-25.)

⁹Appellee has not filed a cross-appeal and so the fault of the *Illinois* in this regard is not at issue. Appellant nonetheless has devoted two pages (AOB 49, 50) of its brief to the argument that the *Illinois* was at fault for having an inadequate lookout. Since the district court found this as a fact and it is not challenged on appeal appellant is merely felling a straw man for the effect of it.

It is true that there were several men on the *Union Star's* forecastle head, but there is no indication that any one of them was stationed there as a lookout. In fact, it is undisputed that a few minutes before the collision the *Union Star* raised her anchor. This required the detail on the forecastle to operate the anchor windlass, retrieve the anchor, secure it and wash it down. In connection with the latter point, Seaman Dobas testified that when he saw the *Union Star* bearing down on the *Illinois* with her anchor still beneath the surface of the water he also saw water coming out of the hawse pipe, indicating the men on the *Union Star's* forecastle head were washing down the anchor chain as it was being retrieved. (Tr. 90:24-91:24.) The reason these men were on the *Union Star's* forecastle head cannot be disputed, and the record contains no testimony whatever that any of them acted as a lookout or reported anything to the bridge.

A lookout who does not report what he sees is the same as no lookout at all, and a crew member who is encumbered with other duties cannot be regarded as a lookout. As to the requirement that a lookout must report, Judge Learned Hand said in *The Madison*, 250 Fed. 850, 852 (2d Cir. 1918):

“A lookout’s duty is to report as soon as he sees, not only any vessel with which there is danger of collision, but any which may in any way affect the navigation of his own.”

This was also held in *Diamond Navigation Co. v. Mystic SS Co.*, 5 F.2d 612 (9th Cir. 1925):

“A lookout must use his ears, as well as his eyes, and must report what he hears as well as what he sees.”

This requirement of vigilance leads to the concomitant requirement that a lookout have no other duties. As stated in *Griffin on Collision*, page 277:

“The importance of unbroken vigilance on the part of the lookout is so great that, on vessels of any size, the rule is definite that the lookout must have no other duty . . . so a deckhand who has other duties, is not a proper lookout.”

That this is the rule in the ninth circuit was held in *The Arkansan*, 112 F. 2d 223 (9th Cir. 1940), and *The Koyei Maru*, 96 F. 2d 652 (9th Cir. 1938). In *The Koyei Maru* both the chief officer and the boatswain were on the fore-castle head with other crew members, but the court said:

“The chief officer had other duties to perform besides those of lookout. They were ‘standby’ duties, which consisted in supervising anything necessary to make the vessel shipshape after her departure from her dock. . . . The boatswain near the first officer was engaged in an unexplained operation of ‘doubling the screws of the anchor.’ Even if the chief officer had attended to none of the ‘standby’ duties on leaving the harbor, they were a charge on his mind as the crew worked on the matters to be done around him which disqualifies him as a free and singleminded lookout.”

The court went on to quote *The Ariadne*, 80 U.S. (13 Wall.) 475, 479 (1872), as follows:

“The duty of the lookout is of the highest importance. . . . It is the duty of all courts charged with the administration of this branch of our jurisprudence, to give it fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and

the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.’’

It is quite true, but also irrelevant, that the navigating officers of the *Union Star* saw the *Illinois*. Visibility was good and it would be surprising if they had not seen her. But this does not establish that there was a proper look out. Appellant has emphasized that there were four men on the bridge of the *Union Star* “who were concentrating on the channel downstream’’ (*sic*: upstream). (AOB 36.) There were the pilot, the master, the quartermaster and the third officer. What appellant does not say is that the third officer’s function is to operate the engine room telegraph and record engine orders in the bell book, and the quartermaster’s function is to concentrate on the compass in order to stay on course. The third man, Pilot Dy, admitted he was busy watching landmarks and aligning his vessel with reference to them. He said: “I took sightings as often as possible, so for instance I knew that I was passing around 1139 on the range from the green light on the jetty to the house of pilots . . .”. (Tr. 220:23-221:2.) The fourth man, Captain Hu, clearly had no accurate idea of the *Illinois*’ heading or movement. For instance, he testified several times that he heard no whistle signals whatever from the *Illinois*. (Tr. 241:2-6; 264:20-23.) It is true that he changed this testimony when reminded of a statement in which he claimed he heard the *Illinois*’ two-blast whistle (Tr. 284:13-20), but in that same statement he also said that at 1136 when the *Union Star* weighed anchor and got under way the *Illinois* was

two points on his port bow more than a mile away, traveling at about ten knots. (Ex. 10, p. 2.) In fact, it is undisputed that at this time the *Illinois* was dead in the water about a half mile ahead of him. Captain Hu also said that at 1126, when he went up to the bridge with Pilot Dy, he observed the *Illinois* three miles away and two points off his port bow. (Tr. 262:13-17.) A glance at the chart shows this to be impossible, since it would put the *Illinois* in the middle of a shoal. Captain Hu also testified that when he gave the order to go full astern one minute before the collision the *Illinois* was one-half mile away, more than two points on the *Union Star's* port bow, and this was the first time he saw any change in the *Illinois's* rate of motion. (Tr. 268:24-269:23.) This of course is also impossible, since it would mean that the *Illinois* would have to proceed to the point of collision at an average speed of almost 30 knots, when in fact she was going $2\frac{1}{2}$ to 3 knots at this point. (Tr. 131:7-15.) At another point Captain Hu testified that when he arrived on the bridge to give the order to weigh anchor he saw that the *Illinois's* pilot boat had already departed and was headed toward the beach (Tr. 262:22-24), whereas in fact the *Illinois's* pilot boat had not even arrived at the *Illinois's* side by that time. (Tr. 106:2-6; 109:16-21.) Later, when the *Union Star* had raised anchor and gotten under way, all he could say with regard to the pilot boat was "I didn't notice." (Tr. 262:22-263:7.) At still another point Captain Hu testified that when the *Union Star* got under way, the *Illinois*, while its bearing was not changing, appeared to be coming "nearer and nearer". (Tr. 238:18-20; Tr. 239:12-15.) Captain Hu went on to say that "then

they steer near where we stop.” (Tr. 239:19.) The *Union Star*’s bell book reflects that her engines were stopped at 1140. (Ex. M.) Since it is undisputed that the *Illinois* was dead in the water from the time the *Union Star* got under way at 1136 until she stopped her engines at 1140, it is obvious Captain Hu had a completely erroneous impression of what the *Illinois* was doing during that period of time. Captain Hu’s testimony demonstrates that although he was aware of the *Illinois*’ presence he was paying little attention to her. Both Captain Hu’s and Pilot Dy’s inaccurate and conflicting testimony concerning the heading and movements of the *Illinois* makes it evident that they were paying more attention to ranges, landmarks and perhaps activities on their own ship than they were to the *Illinois*. Whatever the cause of their preoccupation, it is certain that they did not carefully note the *Illinois*’ initial movements, nor did they have any clear conception of her heading or rate of speed, and because of this they did not apprehend the danger of collision which the *Union Star*’s navigation invited. In short, it cannot be said of this collision that it would have occurred regardless of whether a *Union Star* lookout had, at the appropriate time, reported:

“The vessel ahead is getting under way and turning left.”

Appellant has cited *The Catalina*, 95 F.2d 283 (9th Cir. 1938), for the proposition that appellee had the burden of proving that the *Union Star* had no lookout. This is not true, for in *The Catalina* it was established as a fact that there was a specially assigned lookout who had no other duties. In *Osaka Shosen Kaisha, Ltd. v. Anglo*,

Leitch & Co., 301 F.2d 59 (4th Cir. 1962), cited by appellant (AOB 43), the court not only found that there were eight men on the bridge of the *Atlas Maru* and five men on the forecastle head, but affirmatively found as a fact that an attentive lookout was maintained and that all observable events were promptly noted and acted upon. Finally appellant cites a number of nineteenth century cases for the proposition that a vessel cannot be charged with fault for an improper lookout if that fault did not contribute to the collision. (AOB 44-46.) In fact, this is an inaccurate statement of the law. Failure to maintain a proper lookout is treated as a statutory fault. (*The Madison*, 250 Fed. 850, 852 (2d Cir. 1918).) A statutory fault can only be excused if it is affirmatively established "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." (*The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1874).) A similar concept was expressed somewhat earlier in *The Ariadne*, 80 U.S. (13 Wall.) 475, 479 (1872):

"Every doubt as to the performance of the duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In *The Anna W.*, 201 Fed. 58 (2d Cir. 1912), the court noted that a vessel will be condemned "unless she can show affirmatively that, if there had been a lookout, and he had done his duty in seeing and reporting other vessels, and . . . [his vessel] had navigated in conformity with the information thus obtained, the collision would nevertheless have happened."

This burden is especially heavy where a vessel, such as the *Union Star*, chooses to navigate with engines full speed ahead in extremely close quarters with another vessel. In such circumstances a momentary lapse of attention can prove disastrous. After reviewing all of the testimony and the circumstances of the collision the district judge correctly found that the *Union Star* was not keeping a proper lookout and that this was the principal cause of collision.

2. The UNION STAR Did Not Sound the Required Whistle Signals.

In Captain Hu's testimony and in Pilot Dy's answer to interrogatories, as well as in appellant's opening brief, there is an obvious and noticeable hiatus in the description of the *Union Star*'s maneuvers. The *Union Star* is described as proceeding first on course 348° for a period of three minutes, and then changing course to 353°. Later, at the time of collision, the *Union Star* was headed almost due east, or 090°, but there is no mention of what helm alterations were made to arrive at this collision heading. Obviously the *Union Star* had to turn right from her last course of 353° in order to alter her heading more than 90° so as to be headed due east at collision. Appellant is careful to avoid mentioning this course change, because it was made after the *Illinois* had signalled her own course change and was the occasion for the *Union Star*'s only one-blast signal. Thus, her earlier course change from 348° to 353° was not signalled at all. This follows from the fact that it is admitted that the *Union Star* blew only one whistle signal to indicate a change of course to

starboard, and in its cross-libel appellant admitted that the *Union Star's* one-blast signal was given at the time of the *Union Star's* last starboard helm order. (Cross-libel, page 3, lines 14-17.) The fact that the *Union Star's* one-blast signal followed the *Illinois's* two-blast signal was also corroborated by the testimony of Second Mate McCarthy (Tr. 64:4-17) and Third Mate Stroup (Tr. 81:3-82:6). The failure of the *Union Star* to signal its earlier course change from 348° to 353° is of considerable importance. In effect, it withheld from Captain Sorensen on the *Illinois*, then intending to get under way and turn left toward the departure range, the intelligence which such a signal would have conveyed: that the *Union Star*, then only a few hundred yards away, was initiating a turn in the same direction.

3. The UNION STAR Was at Fault in Directing Her Course Between the ILLINOIS and the Korhyu Wreck Buoy.

Perhaps the most obvious fault committed by the *Union Star* was in forcing a passage between the *Illinois* and the Korhyu Wreck Buoy.

It will be recalled that the *Illinois* was just 400 meters northwest of the Korhyu Wreck Buoy and that the *Union Star* claims to have intended to pass between the *Illinois* and the Korhyu Wreck Buoy on course 353° . On this heading the passage of the *Union Star* between the *Illinois* and the Korhyu Wreck Buoy would have to be accomplished in a path only 246 meters wide. Since Pilot Dy intended to pass 100 meters (Tr. 209:21-210:1) or 150 meters (Ex. E) away from the Korhyu Wreck Buoy it follows that he intended to pass within 96 to 146

meters (103 to 160 yards) of the *Illinois*. The hazards of such a passage can be visualized if it is remembered that the *Illinois* was 455 feet long and that the *Union Star* therefore intended to pass within about a ship length or less of the *Illinois*.

The recklessness of this maneuver can be fully appreciated if it is kept in mind (1) that there is a custom for inbound ships to wait for outbound ships to clear (Tr. 86:7-23) and (2) that Pilot Dy knew, or should have known, that the *Illinois* would proceed south on the 182° departure range line as soon as her pilot disembarked. The *Union Star's* fault was further compounded when, after hearing the *Illinois's* two-blast left-turn signal, she replied to that signal with one blast and turned in the same direction. A possible explanation for this reckless navigation is the assumption made by the *Union Star's* navigators that they were required to pass the *Illinois* port to port and should force such a passage if necessary. The *Union Star's* pilot kept ordering the helmsman to steer further and further to starboard, and Captain Hu evidently thought this was required by the Narrow Channel Rule for in his testimony he kept referring to the "starboard side of the channel". (Tr. 239:14-15; 240:1.) For instance, he said that "automatically we should keep on starboard side of channel (Tr. 239:14-15) . . . We expect *Illinois* should keep her starboard side of channel. . . ." (Tr. 239:24-240:1.) Then Captain Hu complained that the *Illinois* did "not change course, but . . . he just stay starboard side of channel because we already on starboard side." (Tr. 264:25-265:2.) In his earlier statement Captain Hu said that he didn't know

why the *Illinois* was coming left, since there was "lots of room on the other side." (Ex. 10.) In fact, the *Illinois* did not have "lots of room" because the departure range was quite close to the Korhyu Wreck Buoy. This fact was evidently not appreciated by Pilot Dy when he said that on course 353° "the *Union Star* would be at all times to the right of the 002° (reciprocal of 182°) range line on a line of more than a nautical mile. . . ." (Tr. 208:14-16.) This might indicate that he thought the departure range line was one mile to the west of his proposed course, when in fact it was only a few hundred feet.¹⁰

For whatever reason, it is apparent that the *Union Star* was determined to squeeze between the *Illinois* and the Korhyu Wreck Buoy heedless of the consequences which would result from any slight miscalculation on the part of either vessel. This was a clear-cut violation of both the Special Circumstances Rule¹¹ and the General Prudential Rule.¹²

¹⁰Appellant attempts to gloss over this testimony by again suggesting that the translation is faulty. (AOB 9, footnote.) Appellee is not versed in the subtleties of the French language, but suggests that appellant should present Dy's testimony to this court in the same form as appellant presented it to the district court.

¹¹33 U.S.C. 1089. *Special circumstances requiring departure from rules to avoid immediate danger (Rule 27):*

"In obeying and construing sections 1078-1089 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

¹²33 U.S.C. § 1091. *Usual additional precautions required generally (Rule 29):*

"Nothing in sections 1061-1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

4. The UNION STAR Carried a Misleading Signal.

Pilot Hai testified that the *Union Star's* anchor ball was still hoisted just before 1139, when he departed from the bridge and disembarked into the pilot boat. (Tr. 43:15-20.) Captain Sorensen testified that when he observed the *Union Star* at 1140 just before altering course to the left her anchor ball was still hoisted. (Tr. 120:6.) Seaman Dobas testified that when he observed the *Union Star* bearing down on the *Illinois* just before collision her anchor ball was still hoisted and clearly visible on the *Union Star's* foredeck and at the same time he saw her anchor chain tending aft (indicating that the anchor was free of the bottom and the *Union Star* was under way at this time). (Tr. 91:2-18.) The evidence on this point is thus in clear conflict because both Captain Hu and Pilot Dy testified that the anchor ball was lowered before getting under way. The conflict is clear and appellee will observe only that while Captain Hu and Pilot Dy, as well as Captain Sorensen, may be suspected of self-serving testimony in justification of their own actions no such suspicion can attach to Pilot Hai, who left the vessel prior to collision, or to Seaman Dobas, who had nothing to gain by false testimony. Since there is no valid reason to disbelieve Seaman Dobas or Pilot Hai it is submitted that the *Union Star* should be held for the additional fault of carrying an improper and misleading signal, which led the navigators of the *Illinois* to believe that she was still at anchor when in fact she was under way.

D. THE DISTRICT COURT DID NOT ERR IN FAILING TO SPECIFICALLY RULE ON OTHER FAULTS ALLEGED.

The *Union Star* and the *Illinois* were navigating in special circumstances, having to pick up and disembark pilots and maneuver in accordance with local custom. In addition, the *Illinois* was required to depart from the area on a specific range line because of the absence of the normal sea buoy. All of these circumstances made it necessary for each vessel to navigate with the utmost vigilance and caution.

In his memorandum opinion the district judge made it clear that in his opinion the principal and overriding cause of the collision was the failure of either vessel to carefully and continuously watch the other so as to be immediately aware of any unexpected maneuvers.

There were a number of other faults charged by each vessel against the other, but each of these faults was predicated on testimony and evidence which was in a remarkable state of conflict. The *Illinois* charged the *Union Star* with five specific faults and the *Union Star* charged the *Illinois* with eight specific faults. Appellant has offered no authority for the proposition that it was incumbent upon the district court to rule upon all conflicts in the evidence, specifically deal with each charge of fault, and then, like an adding machine, add up the faults in appropriate columns and apportion the damages accordingly. The futility of doing so was commented upon by the English barrister Edward Stanley Roscoe in his text *The Measure of Damages in Actions of Maritime Collisions* (2d ed. 1920) at page 25:

“There is also the further point to be noted, that the datum on which the proportion of damages is based is too uncertain to result in substantial justice. For the relation of negligence in navigation to proportion of damages is so uncertain that the award of proportional damages is just as rough justice as the award of half and half damages.”

Faced with sharply conflicting evidence which was alleged to support a wide variety of faults on the part of both vessels, but feeling that the principal and overriding cause of collision was inattentiveness, the district court felt justified in giving only passing reference to the charges of fault which it found to be comparatively minor. The court in finding of fact No. 8 found:

“The court finds that the faults of each vessel in failing to have the proper lookout, and in all other respects, were equal in degree and contributed in equal degree to the ensuing collision.”

The district judge was required to do no more.

V. THE QUESTION OF LACHES WAS PROPERLY DECIDED BY THE DISTRICT COURT

Appellant unsuccessfully sought to raise the bar of laches in the trial court and now attempts an encore in this court. The same arguments presented below are advanced by appellant here: That it was prejudiced because the libel was not sooner filed and that appellee had “no legal excuse” for not commencing its action at an earlier time. (AOB 58, 59.) By way of introduction to these con-

tentions appellant in its brief (AOB 55-58) purports to summarize the doctrine of laches. This summary is correct, but incomplete because it ignores the basic principle that "the existence of laches is a question primarily addressed to the discretion of the trial court. . . ." (*Gardner v. Panama R.R.*, 342 U.S. 29, 31, 1951 A.M.C. 2048, 2049 (1951).) Discretionary action is final "and cannot be set aside on appeal except when there is an abuse of discretion. . . ." (*Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).) Such abuse occurs "only where no reasonable man would take the view adopted by the trial court." (Id.) The reasonableness of the trial court's action becomes apparent when appellant's arguments are examined in detail.

A. APPELLANT WAS NOT PREJUDICED BY THE LAPSE OF TIME BETWEEN THE COLLISION AND THE FILING OF THE LIBEL.

In the first argument in support of its claim of prejudice appellant requests this court to take judicial notice of events in Vietnam, contending that its investigation of the collision "was severely affected by the war. . . ." (AOB 58.) No reference to the record is made in support of this contention. We are not told in what way the effect of the war in Vietnam was felt by a Chinese steamship company, a Chinese vessel and its Chinese crew. Judicial notice of the war may be proper, but the rhetoric of appellant's brief is the only connection between that war and appellant's ability to prepare its case.

Appellant also notes that certain witnesses were not available at the time of trial. (AOB 59.) The effect of

their absence appellant does not state. Candor requires appellee to concede that its case would have been stronger if the helmsman and watch officer of the *Illinois* had been available to testify. Appellee also regrets that its witness on the issue of damages was killed in an automobile accident shortly before the trial. (Tr. 192:7-9.) A reading of the record, however, hardly supports the inference that these gentlemen, had they appeared, would have been the linchpins upon which the success of either side's case was dependent.

Appellant further argues that certain of its witnesses whose testimony was presented by deposition were "‘hazy, vague and unclear’ on several important points in issue." (AOB 59.) No citation to the record is made in support of this argument. The chief witnesses for appellant were Phan-Van-Dy, pilot of the *Union Star*, and Captain S. D. Hu, the vessel's master. A reading of their testimony (Tr. 198-224; 225-254; 259-286) clearly indicates that their recollection of the collision was not significantly impaired at the time of their depositions.

In its final contention on the issue of prejudice appellant asserts that "because of the passage of time" the master of the *Union Star* testified at his New York deposition "without having the vessel's deck log book available to him. . . ." (AOB 59.) The inference which appellant desires to be drawn is that the log became unavailable because of the passage of time between the collision and the filing of the libel. The record, however, reveals the invalidity of such an inference. Toward the end of trial appellant offered into evidence what its counsel described as "a copy of our rough log book dated August 26, 1960,

which covers the full period in which the collision occurred. . . .” (Tr. 290:25-291:2.) When asked by appellee’s counsel when the copy was made appellant’s counsel replied, “1961, January of ’61.” (Tr. 291:12.) Counsel did not offer any explanation in the trial court why the copies thus obtained and later introduced at trial were not provided to the master at his deposition. Whatever the reason, the record demonstrates that the absence of the log was not related to the time appellee chose to file its libel.

Against appellant’s allegation of prejudice stands the record of the trial. This record establishes that the testimony of the most significant witnesses to the collision was presented to the trial court and that all relevant records required by either side were available at the trial. The trial judge, to whose discretion decision of the issue was committed, found no prejudice to appellant. The record supports that finding and appellee respectfully submits that no basis exists for its overturning by this court.

B. THE DELAY IN FILING THE LIBEL WAS EXCUSABLE.

Appellant asserts that “the record contains absolutely no evidence resembling an excuse by appellee for its admitted delay in filing the libel.” (AOB 60.) This assertion ignores the evidence adduced at trial which revealed a pattern of early investigation, unsuccessful settlement efforts and, finally, litigation. In holding that whatever delay which occurred was reasonable and excusable (im-

pleit in its finding against laches) the trial court considered the following facts:¹³

1. The collision occurred on August 26, 1960, in the mouth of the Saigon River. (Appellant has at no time contended that it was not aware of the occurrence of the collision at or very soon after the time of its occurrence.)

2. On July 7 and July 18, 1961, counsel for appellee and appellant exchanged letters of guarantee issued on behalf of the underwriters concerned in order to avoid seizure of the vessels involved in the collision. (Tr. 330:16-20.)

3. On December 20, 1961, counsel for appellee wrote to counsel for appellant, stating as follows:

“When we obtained the letter of guarantee in lieu of seizing the ship, it was our understanding that you were going to review your file particularly as it relates to the damage statement of the *Union Star*, and we were then going to sit down and see if we could come to any agreement on the case without the necessity of filing suit and going through the time-wasting process of a lot of pleadings.

“Our client has inquired several times as to progress, and we have had to report no progress.

“Will you please consider this at your early convenience and contact us?” (Tr. 330:24-331:11.)

¹³Appellant “disputes that appellee properly introduced a single item of evidence relevant or admissible to refute the defense of laches.” (AOB 61.) Typically, no elaboration of this assertion is made, and two sentences later appellant concedes *arguendo* that admissible evidence was presented. Having conceded its admissibility, appellant then contends that the evidence was irrelevant. (AOB 61.) The illogic of this argument is apparent.

4. On May 11, 1962, appellant's counsel forwarded to appellee's counsel statements of vessel personnel and copies of vessel documents, log book entries and bell book entries. The letter accompanying these documents concluded:

"The writer will be out of town until the week of the 28th, but will arrange to discuss this matter further with you as soon as practicable after his return."
(Tr. 332:11-14.)

5. On June 26, 1962, appellant's counsel wrote to appellee's counsel requesting the particulars of the damage to the *Illinois*. (Tr. 332:15-18.)

6. On September 14, 1962, over two years after the collision, appellant instituted suit against appellee in Formosa. This suit was later dismissed for lack of jurisdiction. (Tr. 332:19-21.)

7. On October 10, 1962, appellant's counsel wrote to appellee's counsel contending that China Union Lines, Ltd. was not liable for certain portions of the damages claimed in behalf of the *Illinois*. (Tr. 332:22-333:2.)

8. On June 14, 1963, appellee filed its libel in this action.

9. On September 23, 1963, appellant filed its answer and accompanied it with a cross-libel alleging that the *Illinois* was solely at fault in the collision between it and the *Union Star*.

Thus, the record reveals that appellant knew of the collision, that it was aware of the possibility of litigation, that it participated in a continuing exchange of informa-

tion with appellee, and that both sides were actively engaged in efforts to resolve the dispute short of litigation. Moreover, just nine months before appellee commenced its action appellant was sufficiently confident of its position to initiate suit against appellee.

Appellant relies heavily upon the decision in *Ronda Cia. Maritima, S.A. v. MV Dagali*, 239 F. Supp. 447, 1964 A.M.C. 2118 (S.D.N.Y. 1964). The court there held that an agreement to appear was not alone sufficient to excuse delay. There is no indication that anything further transpired between the parties, as is the case in the present action. As this court observed in *Brown v. Kayler*, 273 F.2d 588 (9th Cir. 1959):

“Each case [involving laches] must be determined according to its own particular circumstances, and it is rare to find the circumstances in one case to be exactly the same as the particular circumstances of another case.” (273 F.2d at 592.)

In the present case appellant's own counsel gave perhaps the best indication why litigation was finally resorted to by appellee. Toward the end of trial the following colloquy occurred between the court and appellant's counsel:

“The Court: I suppose you have covered all the area of possible adjustment?

. . . .

“Mr. Phillips: There has been a discussion over a period of years in this and I believe more than likely one of the difficulties is the larger amount of damages that the *Illinois* has sustained and therefore creates difficulties from a settlement posture.” (Tr. 254:22-255:4.)

Appellant respectfully submits that delay in filing suit is reasonable and excusable where the record reveals, as it does here, a continuum of activity on each side during the period between the incident giving rise to the dispute and the institution of legal action to effect its resolution.

VI. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OFFERED BY APPELLANT CONCERNING REPAIR COSTS IN JAPAN

At trial appellant sought to introduce testimony concerning repair costs in Japan. (Tr. 306:8.) The trial court excluded this evidence on the basis of irrelevancy, and appellant assigns this exclusion as error. (AOB 62-66.)

In support of its contention appellant relies upon *Restatement, Torts*, section 918, which provides that a person injured by the tort of another is not entitled to recover damages for harm "he could have avoided by the use of due care after the commission of the tort." Appellee has no quarrel with this fundamental principle, which also finds expression in the various decisions cited by appellant. (AOB 64-65.) The doctrine of mitigation as stated by appellant is not applicable here because the trial court held that the provisions of appellee's Government subsidy contract (discussed *infra*) required appellee to have the *Illinois* repaired in a United States shipyard. Appellee was therefore in no position to "avoid" any possible higher repair cost which may have resulted. Given this circumstance the testimony of Mr. Martignoni offered on the subject of repair costs in Japan was obviously irrelevant and was quite properly excluded by the trial court.

VII. REPAIRS TO APPELLEE'S VESSEL WERE PROPERLY ACCOMPLISHED IN THE UNITED STATES IN ACCORDANCE WITH ITS GOVERNMENT SUBSIDY CONTRACT

A. APPELLEE'S SUBSIDY CONTRACT WITH THE GOVERNMENT REQUIRED REPAIRS TO BE ACCOMPLISHED IN THE UNITED STATES.

Appellant concedes (AOB 68) that at all relevant times appellee's vessel, the *Illinois*, was operated under a Government subsidy contract made pursuant to the Merchant Marine Act, 1936. (46 U.S.C.A. §§ 1101-1294.) That act provides in part:

“[T]he operator shall perform repairs to [its] subsidized vessels within the continental limits of the United States, except in an emergency.” (46 U.S.C.A. §1176(7).)

Section II-4 of appellee's contract with the Government contains a similar provision:

“[T]he Operator shall perform repairs to any such [subsidized] vessel within the continental limits of the United States, except in an emergency.” (Exh. R, 160:102.)

Appellant attempts to avoid the plain meaning of the act and appellee's contract by characterizing the damages suffered by the *Illinois* as an “emergency” which would have permitted repairs to have been accomplished outside of the United States. The word “emergency”, the meaning of which connotes a pressing need calling for immediate action, is clearly inapposite to the status of the *Illinois* following the collision. As appellant's counsel noted in his opening statement in the trial court, “each vessel . . . accomplished temporary repairs and . . . about eight hours later . . . she [the *Illinois*] got under way and

went on to her next port.” (Tr. 7:12-15.) A ship which is able to proceed on her voyage following a collision is clearly not involved in an emergency, and appellee most certainly would have breached its subsidy contract had it directed the Illinois to a foreign shipyard for repairs.

B. THE LEGISLATIVE HISTORY OF SECTION 1176(7) OF TITLE 46, UNITED STATES CODE, SUPPORTS APPELLEE'S CONTENTION THAT IT WAS REQUIRED TO REPAIR ITS VESSEL IN THE UNITED STATES.

Appellant quotes (AOB 70-71) a remark made on June 19, 1936, by Senator Copeland in the course of debate over the proposed Merchant Marine Act. In this regard appellant's ploy of quoting out of context may be overlooked because even when the senator's remark is read in context it is not clear to what portion of the act he had reference. Portions of the Congressional Record ignored by appellant do make clear, however, that Senator Copeland was not referring to the present section 1176(7). On June 18, 1936, Senator Bone posed a question to Senator Copeland concerning the repair of American vessels in foreign yards. He said:

“Mr. President, I should like to ask the Senator in charge [Copeland] of the pending bill whether any provision is to be made to reach a situation of this kind[:]

“The Senators from Washington have telegraphic protests from the Pacific coast against the action of a certain steamship company or companies out there which have been docking and repairing these heavily ‘sugared’ boats in Chinese dry docks with Chinese labor. . . . I think there should be language in the bill which will make it impossible for the American

taxpayers to be compelled to provide the money for heavily subsidizing these boats which are repaired in Chinese docks and shipping yards."

Senator Copeland replied:

"Mr. President, I will say to the Senator from Washington that the Senator from Pennsylvania . . . has just offered an amendment to cover the very matter the Senator has in mind." (80 Cong. Rec. 9919 (1936).)

The amendment referred to is now section 1176(7) of Title 46. When it was presented to the Senate on June 19, 1936, Senator Borah asked Senator Copeland concerning its effect. He gave the following explanation:

"As I understand, the intention is to require the use of materials the product or manufacture of the United States in repairing vessels, and that *so far as possible* repairs shall be made in continental American shipyards."

"Mr. Guffey [of Pennsylvania]: The Senator has correctly stated the purpose of the amendment."

"Mr. Copeland: So far as I am concerned, I join my distinguished colleague on the committee in favoring the amendment." (80 Cong. Rec. 10077-10078 (1936).) (Emphasis added.)

Appellant's interpretation of the legislative history is thus misleading and demonstrably incorrect.

C. APPELLANT IS LIABLE FOR THE COST OF REPAIRS ACCOMPLISHED IN THE UNITED STATES PURSUANT TO ITS GOVERNMENT SUBSIDY CONTRACT.¹⁴

In further reiteration (AOB 71) of its unsupported contention that the cost of repairs made in the United States was an improper measure of damages, appellant relies on the decision in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 72 L.ed. 290 (1927), where Justice Holmes held that a time charterer could not recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semi-annual drydocking required by the charter party. It is apparent that appellee's position is not analogous to that of the time charterer in *Robins* as appellant suggests, but rather to that of the vessel owner. It is undeniably the law that a recoverable item of collision damage is the loss of hire suffered by a vessel in collision whose charter is interrupted. (*United States v. Panama Transp. Co.*, 174 F. Supp. 592, 1959 A.M.C. 1435 (S.D.N.Y. 1959).) In passing it may be noted that the broad statement by Justice Holmes quoted in appellant's brief (AOB 71) has previously troubled this court (*Borcich v. Ancich*, 191 F.2d 392 (9th Cir. 1951) (following *Robins*); *Carbone v. Urcich*, 209 F.2d 178 (9th Cir. 1953) (on similar facts overruling *Borcich* and distinguishing

¹⁴In the district court appellant argued that any amounts received by appellee from the Government in direct or indirect reimbursement of the cost of repairing the *Illinois* should be deducted from the total repair bill. The decision of this court in *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962), concerning the collateral source doctrine has apparently persuaded appellant to abandon the contention on appeal. The argument now advanced takes a different tack, but follows an equally misdirected course.

Robins), and *Robins* clearly deserves no consideration where it is not in point.

Appellant also relies upon *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), and then is forced to concede its inapplicability to the present case because there is "no contractual relationship between the parties here. . . ." (AOB 72.) Finally, appellant cites *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 10 L.ed. 2d 1 (1963), for the proposition that "the full scope of the admiralty rule of damages must prevail over contrary provision and the absence of a contractual relationship between the parties is not conclusive." (AOB 72.) In *Weyerhaeuser*, the Supreme Court held that a private vessel owner was entitled to recover as part of collision damages from the United States sums paid in settlement of a personal injury claim made by a Civil Service worker employed on the Government vessel involved, notwithstanding the fact that the employee had received compensation under the Federal Employee's Compensation Act, stating that "the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision." (372 U.S. at 603, 10 L.ed. 2d at 6.) The point decided in *Weyerhaeuser* has no application here, even as distorted by appellant.

D. THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND CHINA IS INAPPLICABLE TO THE QUESTION OF APPELLANT'S DAMAGES.

Although the gossamer threat of appellant's argument (AOB 72-73) is difficult to follow it appears to rest on the premise that an award of damages based on the cost of repairs in a United States shipyard would accord American vessels more favorable treatment than Chinese vessels, in violation of the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946. ([November 30, 1948] T.I.A.S. No. 1871.)

In Restatement (Second), Foreign Relations Law of the United States, Section 146 (1965), the following guideline is established for the interpretation of a treaty:

“The extent to which an international agreement creates, changes, or defines relationships under international law is determined in case of doubt by the interpretation of the agreement. The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in the light of all relevant factors.”

The speciousness of appellant's syllogistic argument becomes apparent from even a casual examination of the treaty in question. Such examination reveals that the purpose of the treaty was far more humble than, as appellant suggests, to abrogate significant portions of the laws governing the United States maritime industry.

Appellant relies on paragraph 1 of article XXII of the treaty, which provides in relevant part:

“The vessels and cargoes of either High Contracting Party shall, within the ports . . . of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party. . . .”

Appellant ignores the remaining paragraphs of article XXII, which shed considerable light on the meaning which should be attached to paragraph 1. Paragraph 2 prescribes the levy on Chinese vessels of duties of tonnage, harbor pilotage, lighthouse and quarantine which do not equally apply to American vessels. In paragraph 3 charges on passengers, passenger fares, freight money and the like are not to be applied so as to give one country an advantage over the other. The next paragraph provides that competent pilots are to be made available, and paragraph 5 gives assurance that if a Chinese vessel in distress puts into an American port, “it shall receive friendly treatment and assistance. . . .” The sixth and final paragraph promises to accord Chinese vessels treatment no less favorable than that accorded vessels of any third country. Considered in context, the provisions of article XXII are obviously directed to the establishment of equality in the ordinary course of commerce between the two parties, and paragraph 1 thereof cannot reasonably bear the strained meaning which appellant asks this court to apply.

VIII. THE COST OF DRY-DOCKING THE ILLINOIS WAS PROPERLY INCLUDED IN THE DAMAGES AWARDED APPELLEE BY THE TRIAL COURT

Appellant contends (AOB 66-67, 73-75) that appellee failed to establish the reasonableness of its repair cost

in regard to the item concerning the dry-docking of the *Illinois*. In support of this contention appellant relies upon the testimony of its expert witness, John Walsh. Mr. Walsh was of the opinion that dry-docking was unnecessary because replacement of the plate involved could have been accomplished by appropriate ballasting and placing of weights on the *Illinois*. (Tr. 311:16-312:13.)¹⁵ He admitted that his opinion was based solely on the survey report made Mr. Frank George of Pillsbury & Martignoni, who Mr. Walsh agreed was one of the best marine surveyors in the city of San Francisco. (Tr. 313:20-22.) This report (Ex. O) was received into evidence at the request of appellant's counsel. (Tr. 312:14-16.) Examination of this report reveals that the decision to dry-dock the *Illinois* was made only after careful consideration. Mr. George's preliminary conclusion was that dry-docking would not be required. (Ex. O, p. 7.) When the vessel arrived at the shipyard a supplementary survey was held by Mr. George in company with four other surveyors. (Ex. O, p. 8.) Upon reexamination of the damaged areas Mr. George concluded that "since the lower seam of plate H-6-S was only approximately 4" above floating waterline of vessel . . . it would be necessary to dry dock vessel at this time to renew plate H-6-S." (Ex. O, p. 8.) Mr. Walsh conceded that he had no knowledge of the conditions pertaining at the time the *Illinois* was dry-docked, that dry-docking would in any event add a margin of safety, and

¹⁵Appellant states that Mr. Walsh "concluded that dry docking might easily have been necessary by reason of repairs or maintenance unrelated to collision damages." (AOB 74.) This statement is unsupported by citation to the record, most probably because the conclusion was never uttered by Mr. Walsh but only by appellant's counsel during argument on an objection. (See Tr. 314:7-11.)

that his view simply reflected a dispute between experts. (Tr. 315:24-316:21.) The district court elected to follow the judgment of Mr. George rather than Mr. Walsh. Appellee respectfully submits that no basis exists for holding this election to be clearly erroneous, and the award of damages covering the cost of dry-docking the *Illinois* should therefore be upheld.

CONCLUSION

Although the amount at issue is comparatively small for a maritime collision, the issues, both factual and legal, are quite complex. The district judge was faced with contradictory testimony and a record with conflicts almost impossible to resolve.

The district court gave careful, meticulous attention to the numerous contentions of the parties, to the testimony and to all of the evidence. The record, we submit, leaves a firm and definite conviction that justice has been done, rather than a conviction that a mistake has been committed. The judgment of the district court should be affirmed.

Dated, San Francisco, California,

December 5, 1966.

Respectfully submitted,

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Attorneys for Appellee

States Steamship Company.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLARD G. GILSON,

Of Attorneys for Appellee

States Steamship Company.

(Appendix A Follows)

Appendix

No. 20,920

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHINA UNION LINES, LTD.,
a corporation,

Appellant.

vs.

STATES STEAMSHIP COMPANY,
a corporation,

Appellee.

**CLOSING BRIEF FOR APPELLANT
CHINA UNION LINES, LTD.**

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FEB 15 1967

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STATES STEAMSHIP COMPANY,
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Appellee.

**CLOSING BRIEF FOR APPELLANT
CHINA UNION LINES, LTD.**

I

INACCURACIES IN APPELLEE'S BRIEF

There are certain inaccuracies and misleading inferences in Appellee's brief which should be pointed out so that the Court may fairly weigh the contentions of the parties.

1. At the bottom of page 8, Appellee implies that there is proof of a strong current in the Coconut Bay area by pointing out that the UNION STAR changed heading $22\frac{1}{2}$ degrees from the time she anchored until she got underway. Actually the UNION STAR's heading changed

only 12 degrees from due north to 348°. When one realizes that the UNION STAR was at anchor for four hours, this change is hardly indicative of a current which would turn the ILLINOIS 40° in a contrary direction in about ten minutes.

2. At the bottom of page 10, Appellee implies that Captain Sorensen regularly navigated the ILLINOIS out of the Saigon River in reliance on the exit range. Yet Captain Sorensen testified that the exit range was not usually pointed out but was pointed out by the pilot on this one trip because the sea buoy was missing (TR 107: 11-25); Pilot Hai noted that the exit along the range line with the sea buoy missing was difficult (TR 42:20-25, 43: 1-4).

3. At the bottom of page 11 in the footnote, Appellee implies that the quotation in Appellant's brief is false. Actually, the citation is correct and the disagreement relates to the inference to be derived from the language.

4. At the bottom of page 11 in the footnote, Appellee implies that there were no other witnesses not produced by ILLINOIS who knew the details of the navigation of the ILLINOIS, yet counsel for Appellee admitted that the Junior Third Officer, who was on the bridge of the ILLINOIS, Garfield Greene, was contacted by Appellee for a deposition. (Thereafter Mr. Greene was said to be unavailable.)

5. At the top of page 16, Appellee implies that the chart attached to Appellant's brief is improperly drawn and misleading. Actually, the angle of the exit range represented in both Appellant's and Appellee's briefs are

exactly the same (182°). The difference is that Appellant's line is drawn along the shore line on Point Vung. The bearing line is defined by Pilot Dy as the 164-foot summit near Nui Nua by the Point Vung (TR 206:24-25). The range must have been a visible feature, and the shore line was probably the most visible part of the point. Appellee's line, on the other hand, is drawn along the road inland in order to narrow the space between the line and the wreck buoy.

6. Appellee implies at the bottom of page 24 that there was inadequate room for the UNION STAR to move between the range line and the Korhyu wreck buoy. However, the contentions are both erroneous and misleading. If ILLINOIS were 400 meters from the wreck buoy and UNION STAR intended to pass 100 meters from the buoy, this would leave 300 meters (984.30 feet) between ILLINOIS and UNION STAR at the time of passing, *not* the 146 meters stated by Appellee. UNION STAR had a beam of 50 feet. This means that the UNION STAR would have had an area approximately 18 times that required for a port-to-port passing of the ILLINOIS. This is hardly an inadequate area for navigation. Even if the distance between the vessels were 146 meters (479.03 feet), this would still provide over eight times the width necessary for safe passage.

7. Appellee, at the bottom of page 21 misrepresents the statement of Appellant with regard to *The Catalina*. It is not cited in Appellant's Opening Brief for the proposition which Appellee contends, but rather for the proposition stated—that the burden of proving the lookout was faulty, i.e., inattentive, was on the vessel claiming faulty lookout.

II

**APPELLEE RAISES ALLEGED FAULTS OF UNION STAR NOT
FOUND BY THE TRIAL COURT**

The trial court found that UNION STAR "violated Article 29 of the International Rules in failing to maintain a proper lookout." (Conclusion of Law III, Record 93:4 and 5) The only finding of fact actually made by the trial court related to the question of adequacy of lookout (Conclusion of Fact VII, Record 91:16-26). Appellee has not appealed the failure to find further fault on the part of UNION STAR, and it is not appropriate for Appellee to argue other allegations of fault of UNION STAR.

However, Appellee's assertions cannot be received without comment. Even if Appellee could argue these allegations at this time, they should not prevail.

- (a) **UNION STAR** lowered its anchor ball immediately upon getting underway and did not make a misleading signal

As Appellee points out, there is a clear conflict of testimony. Appellee suggests that the testimony of Captain Hu and Pilot Dy as well as Captain Sorensen may be self serving and that the resolution ought to rest on the testimony of Pilot Hai and Seaman Dobas. Appellee agrees that the testimony of Captain Sorensen is misleading. Seaman Dobas' testimony is subject to strong doubt as he was on the main deck of ILLINOIS, and his vision forward was totally obscured or at least severely handicapped by the high forecastle and masts of the ILLINOIS. Captain Sorensen himself notes that an observer on the main deck could not see the UNION STAR (TR 141:15 to 144:9).

Hence, Dobas' detailed observations of activity on UNION STAR do not ring true.

Pilot Hai was in the pilot boat alongside the ILLINOIS at 1139 (TR 113:18). The UNION STAR got underway only about two minutes earlier (Ex M, N). Considering the time required to leave the bridge and make way to the deck of the ILLINOIS, bring the pilot boat alongside and descend the pilot ladder into the boat, Pilot Hai probably left the bridge of ILLINOIS before or at the time UNION STAR got underway. Hence, Pilot Hai's statement that he saw the anchor ball of the UNION STAR *before* he left the bridge of the ILLINOIS is not indicative of a failure to lower the UNION STAR anchor ball (TR 43:19-20). Consequently, the clear and unequivocal statements of Captain Hu (TR 229:17-25; 230:1-4) and Pilot Hai (TR 204:2-16) that they personally saw the anchor ball of UNION STAR lowered as soon as she got underway should prevail.

(b) UNION STAR blew all required whistle signals

In a very imaginative section, Appellee conjectures that the UNION STAR changed course from 348° to 353° without blowing a whistle signal. This is all based upon the single statement in the cross-libel that the one-blast signal was given at the time of the UNION STAR's last starboard helm order (Appellee's Opening Brief 23-24). Appellee apparently theorized that since the UNION STAR was headed east at the time of collision, UNION STAR must have given a starboard helm order to change her

heading eastward. The theory is ostensibly that if this is the turn signaled by the one-blast signal that Appellee can argue that at the time UNION STAR changed course to 353°, there was no whistle signal. The attempt is valiant but is not supported by any evidence. The evidence is clear that the UNION STAR sounded a one-blast whistle signal at approximately 1140, which was the time that she came to course 353° (Ex N) and about the time that Captain Sorensen heard her one-blast whistle signal very shortly after his own two-blast signal. The signals were blown almost simultaneously (TR 64:22-25; 65:1-6; 81:23-25; 82:1-6).

The fact that the UNION STAR was headed approximately due east at the time of collision is explained by the fact that the UNION STAR, as soon as the danger became apparent, sounded a three-blast signal indicating her engines were full astern. As Captain Hu and Pilot Dy indicated and as any mariner knows, the reversing of a single screw ship throws her stern to the left causing her heading to change markedly to the right (or in this case, to the east) (TR 240:14-23; 213:17-21).

III

Appellant hereby adds to the authorities cited in Section II A 2 of its Opening Brief (on the adequacy of UNION STAR lookouts) the following case:

The Pilot Boy, 115 Fed. 873 (4th Cir. 1902).

IV

Appellant hereby adds to the authorities cited in Section III of its Opening Brief (on failure to rule on various specific faults alleged to determine proportion of fault) the following:

N. M. Paterson & Sons, Limited v. City of Chicago,
209 F. Supp. 576; 1962 A.M.C. 2215 (N.D. Ill.
E.D., 1962);

Staring, "Contribution and Division of Damage in
Admiralty and Maritime Cases," 45 Cal. L. Rev.
304 (1957).

Dated, San Francisco, California,
December 23, 1966.

Respectfully submitted,

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No. 20,929 /

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM D. PEDERSEN,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-APPELLANT

FILED

AUG 22 1966

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FEB 15 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,929

UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM D. PEDERSEN,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-APPELLANT

JURISDICTIONAL STATEMENT

This action was commenced by the United States, pursuant to 28 U.S.C. 1345, to recover an erroneous payment of moneys to the defendant-appellee upon his release from active duty with the United States Marine Corps (R. 2-3).^{1/} A judgment adverse to the United States was entered on February 15, 1966 (R. 92). Notice of appeal was filed on April 5, 1966 (R. 93). This court has jurisdiction to entertain the appeal pursuant to 28 U.S.C. 1291.

1/ "R" refers to Volume I of the Transcript of Record on appeal.

STATEMENT OF THE CASE

Apparently believing himself physically fit to remain on active duty, Major William D. Pedersen, service number 047192, United States Marine Corps Reserve, the appellee herein, on July 3, 1958, requested retention on active duty with the regular Marine Corps establishment through September 30, 1960. However, on July 29, 1958, appellee was notified that his request for retention on active duty had been disapproved because there was no billet vacancy in the Regular Marine Corps for an officer of his rank and qualifications,^{2/} and that he would be involuntarily released from active duty to the Marine Corps Reserve (Pl. Ex. 1, p. 9). By speedletter from the Marine Corps Commandant, dated July 29, 1958, appellee's commanding officer was notified that appellee was being involuntarily released from active duty and was eligible for readjustment pay under provisions of Marine Corps Order 1900.1B and Public Law 84-676 (Pl. Ex. 1, p. 6). Appellee's orders, dated September 10, 1958, stated that he was involuntarily released from active duty as of September 15, 1958, and was thereupon transferred to Class III United States Marine Corps Reserve and assigned to the 12th Marine Corps Reserve and Recruitment District. Appellee was not actually discharged from the Marine Corps Reserve until years later (Pl. Ex. 12).

^{2/} Appellee is a lawyer and his military occupational specialty was that of law officer (Pl. Ex. 1, p. 12).

His orders stated that he was eligible for readjustment pay based on 10 years, six months and 15 days of active duty, less mustering out pay of \$200 already paid him (Pl. Ex. 1, p. 5). Based upon that service, appellee was entitled to readjustment pay of \$3355, less the \$200 mustering out pay already received, or \$3155 (Pl. Ex. 6).^{3/} Inexplicably, however, appellee received instead a check for \$12,465.17 (Pl. Ex. 3) which represented severance pay of \$13,220 less withholding tax and other deductions^{4/} (R. 12). Neither in the Marine Commandant's speedletters nor in appellee's orders releasing him from active duty was there any authorization for the payment of severance pay, nor was there any suggestion that appellee was being severed from the service, rather than being released from active duty to a reserve status. (Pl. Ex. 1, pp. 5, 6, 8).

On January 19, 1959, just slightly more than four months after the disbursement of severance pay to appellee, Lt. Col. R. E. Baldwin, the chief of the Examination Branch, Disbursing Division

^{3/} Readjustment pay is computed on the basis of one-half of one month's basic pay for the grade in which the involuntarily released reservist is serving at the time of his release from active duty multiplied by the number of years of active service. A part of a year of service of six months or more is treated as a whole year for purposes of this computation (Pl. Ex. 10, p. 5). At the time of his release, appellee's basic pay was \$610 per month (Pl. Ex. 2, p. 2) and for readjustment pay purposes he had 11 years service.

^{4/} Severance pay was computed by multiplying the basic monthly salary (\$610) by 2 and the result by number of years of active duty (11) and then subtracting the previously paid \$200 mustering out pay (Pl. Ex. 2, p. 2).

of the Marine Corps, informed him by letter that he had been overpaid \$10,065 at the time of his release from active duty and requested appellee to repay that amount by check or money order to the order of the Treasurer of the United States (Pl. Ex. 6).

By letter of February 7, 1959, appellee denied that he had been overpaid and refused to make repayment (Pl. Ex. 7). Following two more unsuccessful attempts by Lt. Col. Baldwin to persuade appellee to return the excess payment (Pl. Ex. 8, pp. 5-7, 8), the debt was turned over to the General Accounting Office for collection (Pl. Ex. 8, p. 1). That Office was equally unsuccessful in obtaining reimbursement (Pl. Exs. 4, 5). This action was brought by the United States to recover the erroneous payment of the difference between the authorized readjustment payment and the unauthorized severance payment, or \$10,065, plus interest (R. 2-3).

At the trial, the Government offered eleven exhibits (Tr. I 6, 7, 9, 44, 63, 64, 65, 66, 71, 76, 76).^{5/} Exhibit 1 included the basic active duty agreement between the Government and appellee, extensions thereof, the memorandum denying a further extension of active duty, speedletters from the Marine Corps Commandant authorizing payment of readjustment pay to appellee,

^{5/} "Tr. I" refers to the transcript of proceedings held in the district court on January 17, 1964, which is Volume II of the record filed in this appeal. "Tr. II" refers to the transcript of proceedings on January 4, 1966, which is Volume III of the record.

and the order involuntarily releasing appellee from active duty with readjustment pay. Exhibits 2 and 3 were appellee's pay record, with entries showing credit for severance pay, and a Treasury check in the sum of \$12,465.17 payable to and endorsed by appellee.

Exhibit 4 included appellee's tax return for 1958, in which he did not report as income the disputed \$10,065, his letter to the District Director of Internal Revenue explaining why he failed to report this sum, and an enclosure to that letter which was a letter to him from GAO dated May 5, 1959, demanding reimbursement to the Government of \$10,065.

Exhibit 5 was a letter from appellee to GAO refusing to reimburse the Government but stating that "It may be that I will end up paying you the major position of this claimed indebtedness, since I was a fool not to have insisted upon appearance before a disability examining board [relative to alleged disability caused by chronic sinusitis] prior to my release after eleven years of active duty ..." (Pl. Ex. 5, p. 4).

Exhibits 6 and 8 were two letters from Lt. Col. Baldwin informing appellee of the overpayment and requesting repayment of \$10,065 and an attachment to the second letter showing in concise form the credits and debits leading to the overpayments. Exhibit 7 was appellee's letter in response to exhibit 6 denying his indebtedness.

These first eight exhibits were received in evidence (Tr. I 9, 44, 63, 64, 66, 67). However, exhibit 9, a medical report of appellee's pre-release physical examination and exhibit 11, a letter from the Chief, Bureau of Medicine and Surgery to the Navy Judge Advocate General reviewing appellee's service medical record, were not admitted into evidence (Tr. I 74, 77). Exhibit 10, a certificate of the Comptroller General certifying appellee's indebtedness was admitted (Tr. I 77).

The defense proceeded on the theory that the severance pay was properly paid to appellee as disability severance pay. In support of this connection, appellee testified that he had sinusitis at the time of his release from active duty in September 1958, which condition was caused by a rapid descent from high altitude in a Navy jet plane in 1953 (Tr. I 47, 48, 49). He also testified that at the time of trial he still suffered from the sinus condition (Tr. I 52). On cross-examination, appellee stated that he did not know whether he had ever been examined by a disability evaluation board prior to his release from active duty (Tr. I 64).

Following the presentation of evidence and arguments, the district court ruled from the bench that the Government had failed to meet its burden of establishing entitlement to the amount claimed, i.e., \$10,065 (Tr. I 87-88, 91) and that appellee did not have the burden of establishing his entitlement to the money (Tr. I 87). Accordingly, judgment was entered in favor of appellee (Tr. 74).

On the appeal of the United States from that judgment, (No. 19,405), this court, on March 5, 1965, "[r]everse[d] and remanded for a new trial which will permit each side to offer the evidence it believes should be considered by the trial court" (R. 86).

At the new trial plaintiff's exhibits 1 through 8 were admitted in evidence with the same numbering (Tr. II 5). The Comptroller General's certificate, exhibit 10 at the first trial, became exhibit 9. New exhibit 10 was Marine Corps Order 1900.1B, in effect at the time appellee's release from active duty, which governed the making of readjustment payments to members of the Marine Corps. The Navy Comptroller's Manual was introduced as new exhibit 11. It was in effect at the relevant time, and governed the making of disability severance payments to members of the Navy and Marine Corps. Paragraph 044187, subparagraph a of the Manual conditioned payment of disability severance pay on members being separated (discharged from the service) for physical disability, and required specification in the members' separation orders of their entitlement to disability severance pay.

The Government also introduced exhibit 12, appellee's complete service medical record, including the medical report of appellee's pre-release physical examination in which it was stated that appellee was "qualified for active duty at sea and/or foreign shore and for: RAD" (Pl. Ex. 12).^{6/}

^{6/} Plaintiff's exhibit 11 at the first trial, the letter from Chief, Bureau of Medicine and Surgery to the Navy Judge Advocate General was not reoffered at the new trial.

In addition to the above exhibits, the Government introduced the testimony of two expert witnesses, Harry G. Abajian, the Deputy Officer in charge of the Navy Finance Office at Long Beach, California, and Captain Albert E. Morris, Senior Medical Officer at the Los Alamitos Naval Air Station.

Mr. Abajian testified, inter alia, that since appellee's release order called for the payment of readjustment pay and he was actually paid severance pay, the payment of severance pay could not be justified, and something was wrong from an auditing point of view (Tr. II 15, 20). In response to a question from the court, the witness testified that the disbursing officer is controlled by the releasing order (Tr. II 22). Also in response to a question from the court, Mr. Abajian stated that the computation of severance pay here itself was mathematically correct but questioned its propriety without substantiation in appellee's orders (Tr. 15, 18-19). On cross-examination, the witness reiterated his testimony that in light of appellee's release orders, his pay record was incorrect (Tr. II 31).

Captain Morris testified that he had reviewed appellee's entire service medical record and found nothing contained therein to indicate disability upon his release from active duty (Tr. II 40). Specifically, Dr. Morris testified as follows (Tr. I 47-49):

Q Yes. Was Mr. Pedersen present for that examination, yes.

A It is dated 10 September 1958. I am sure he was present for the examination, yes.

Q Can you tell from the record, though, if he was present?

A Yes, because it is signed by him.

Q All right. On that examination, are there any defects or disabilities noted?

A There are not.

Q Is this a complete examination?

A Yes.

Q Were there any complaints given by Mr. Pedersen?

A There is no record of them.

Q If he had given a complaint, would there have been a record?

A There would, yes.

Q Captain Morris, you said you reviewed this medical record prior to your testimony here?

A Yes.

Q Is there any notation in there of Mr. Pedersen requesting a Medical Board examination, or the fact that he was examined by a Medical Board?

A No.

Q Is there anything there to show Mr. Pedersen was disabled?

A No.

On cross-examination, Dr. Morris, taking the record as a whole, diagnosed appellee as being subject to chronic respiratory infections. However, he didn't believe appellee's temporary grounding in 1953 as a marine aviator for ear trouble had any relationship to his claimed sinusitis, since there was no notation in the medical record of sinus involvement at that time (Tr. II 51, 53).

Appellee chose to stand on his testimony given at the first trial and offered no new evidence (Tr. II 57). In this closing argument, appellee took the position that the Government had the burden of proving the negative proposition that the Secretary of the Navy had not made a determination that appellee was physically disabled. And since there was no direct evidence in the record that the Secretary had not made such a determination, it had to be inferred from appellee's complaints of sinusitis since 1953 and the payment to him of an amount equal to severance pay upon his release from active duty that the Secretary had in fact made the required disability determination (Tr. II 64-74). At one point, the court interrupted counsel because of its doubt that the Secretary had even made such a determination (Tr. II 69):

THE COURT: Well, Major Pedersen was not separated because of disability, was he?

MR. FRASER: It is our position that he was, your Honor.

THE COURT: The record doesn't show that.

MR. FRASER: He was separated with a disability.

THE COURT: I say he wasn't separated because of disability. We have in the record here the request that he still be retained on active duty, which was turned down. There is nothing here to show that he was separated because of disability. The record doesn't show that. 7/

7/ Compare, Finding 16, R. 91, discussed, infra, p. 21 .

Following argument, the court ruled from the bench in favor of appellee (Tr. II 84). In making its ruling the court said, inter alia (Tr. II 83-85):

It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the government, and unless the government can show that there has been an absolute mistake, why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later.

I am not satisfied with the evidence of the government at all. I am no more satisfied now than I was before. The Circuit on the first time around didn't do us very much good. Maybe on the second time around the Circuit can clarify the situation. Maybe it can come to some conclusion.

But from the record before me, I am still of the opinion that the government has failed to establish that it is entitled to judgment in this case.

The judgment will be for the defendant.

Will you prepare the findings of fact and conclusions of law?

MR. FRASER: Yes, your Honor.

THE COURT: This is not the end of the case, however. I suppose you will have another trip to the Circuit and maybe another trip back here. I don't know.

It seems to me that there are just thousands and millions of people in the armed services, the Captain over here has been in the service a long, long time, and he is discharged and it is an honorable discharge, and he gets certain compensation from the government because of his long years of service. Doesn't he have a right to rely on what the government gives him?

Well, I was in the Army many, many years ago. Of course, when I was discharged, I didn't get any back pay or severance pay. I was just glad to get out. Suppose they came in now and said, "When you were in the Army in 1918 or 1919, you received a hundred dollars or two hundred dollars or

five hundred dollars that you weren't entitled to and we want it back."

Well, with just a private individual, they wouldn't have a leg to stand on. Because it is the government they do have some recourse.

If the Circuit wants to order the Major to return this money, it can do so, but I just won't under this testimony.

The court adopted verbatim the findings prepared by counsel for appellee, inter alia, that appellee had been separated from the service on September 15, 1958; that the fact that appellee was paid severance pay created the inference that he was entitled to severance pay; that appellee presently suffers from chronic sinusitis caused by flying in a jet aircraft while on active duty; that there was no evidence of the results of the physical examination given appellee within 72 hours prior to his release from active duty; that from appellee's pay record and his disability, an inference was created that the Secretary of the Navy made a determination that appellee was entitled to disability severance pay; and that upon his separation appellee was entitled to disability severance pay (R. 88-91).

Accordingly, judgment was entered in favor of appellee and against the United States (R. 92). From that judgment the Government appeals.

SPECIFICATIONS OF ERROR

1. The district court erred in holding that the Government had failed to establish by the evidence its entitlement to recover judgment against appellee.

2. The district court erred in placing the burden of establishing appellee's nonentitlement to disability severance pay on the Government.

3. The district court erred in finding that the Secretary of the Navy had determined that appellee was entitled to disability severance pay and that appellee was eligible for disability severance pay at the time of his release from active duty.

4. The district court erred in holding that persons receiving overpayments from the Government are entitled to rely on Government pay records which, although erroneous in fact and law, are not erroneous on their face.

5. The district court erred in failing to rule that the Government may recover public funds erroneously disbursed together with interest thereon.

ARGUMENT

THE EVIDENCE COMPELLINGLY ESTABLISHED AN ERRONEOUS PAYMENT TO APPELLEE OF SEVERANCE PAY BY THE UNITED STATES AND THE ENTITLEMENT OF THE UNITED STATES TO A JUDGMENT AGAINST APPELLEE IN THE AMOUNT OF THAT OVERPAYMENT.

Introduction and Summary. The uncontradicted evidence of record shows that appellee, a reserve law officer in the Marine Corps, received severance pay of \$13,220, upon his release from active duty in 1958, although he had not been discharged from the service, but had only been released from active duty to a reserve status. All of appellee's military records also reflect that he was entitled only to readjustment pay of \$3,155 at that

time, and that he did not suffer from any disability, and had not satisfied any of the prerequisites for disability severance pay. In addition, the Government corroborated the documentary evidence with testimony showing that the \$13,220 payment to appellee was erroneous, and that the amount paid should have been only \$3,155.

Notwithstanding this overwhelming and largely uncontradicted evidence that the Government had overpaid appellee by \$10,065 because of a mistake, the district court ruled that the Government had not met its burden of proving payment by mistake. The court apparently believing that the Government must prove an "absolute mistake" before it can recover. (Tr. II 83).

We show first that, although appellee received the sums of money which would be due him as disability severance pay, the evidence of record shows, beyond any reasonable doubt, that appellee was not entitled to disability severance pay in 1958, both because he was not separated from the service (but only released from active duty to reserve status), and because he had never applied for a disability rating, nor been found disabled and was not in fact disabled.

We then go on to show that the district court's decision -- unsupported by any of the evidence of record -- was based upon an improper legal standard. For, the district court based his decision upon the theory that the Government cannot recover for overpayments made erroneously by its disbursing officials, unless the error is one patent on the face of the Government's finance

records. But the law imposes no such burden on the government. On the contrary, it has long been settled that the government has the right to recover funds mistakenly paid by its disbursing agents, regardless of whether the mistake was one of computation, or improper application of the law to a set of facts. United States v. Burchard, 125 U.S. 176; Heidt v. United States, 56 F. 2d 559 (C.A. 5). Thus, under the facts as shown clearly on this record, the United States was entitled to judgment for the overpayment.

A. The Evidence Clearly and Compellingly Established the Erroneous Payment to Appellee of Severance Pay Upon His Involuntary Release From Active Duty to a Reserve Status.

Appellee, a Marine Corps Reserve officer, was involuntarily released from active duty, and transferred to a reserve status, solely for want of a billet for him in the Marine Corps establishment (Pl. Ex. 1, p. 9). In connection with the Marine Corps' determination not to retain appellee on active duty, under authority of MCO 1900.1B, par. 3j, the Marine Corps Commandant directed the payment to appellee of readjustment pay and said nothing in his speedletters concerning severance pay (Pl. Ex. 1, pp. 6, 8). Nor did appellee's release orders authorize anything other than readjustment pay upon his release from active duty (Pl. Ex. 1, p. 5). And, indeed, these documents could not have authorized disability severance pay since, as required by 10 U.S.C. 1203 and 1212 and the Naval Comptroller's Manual, Par.

044187, members in appellee's status were entitled to disability severance pay only if they were discharged from the service.^{8/}

Clearly, appellee was not discharged from the service. His release orders, dated September 10, 1958, ordered him transferred to Class III USCMR with assignment to the 12th Marine Corps Reserve and Recruitment District. Had appellee been discharged, his reserve obligation would have terminated. See Parliman v. Delaware, L. & W. R.R., 163 F. 2d 726 (C.A. 3).

Aside from the elemental requirement that before a service member may receive severance pay he must be severed, the Navy Comptroller's Manual (Pars. 044185 and 944187) permits the actual payment of severance pay only if the member's entitlement is stated in his separation (discharge) orders. And Mr. Abajian, the expert witness, confirmed that disbursing officers are controlled by the members' orders (Tr. II 22). Here, appellee's release orders made no mention of severance pay but authorized only readjustment pay.

Despite these insuperable legal impediments to appellee's entitlement to severance pay, his records show that he did, in

^{8/} An exception is made for members who have at least 20 years of service and who would be qualified for disability retirement but for the fact that their disabilities are less than 30 percent under the Veterans' Administration rating system. These members may be transferred to inactive status rather than separated, if they so elect. 10 U.S.C. 1203, 1209.

fact, receive the amounts which would have been due as severance pay, instead of the substantially smaller sum of readjustment pay to which he was entitled upon his release from active duty and transfer to a reserve component. Indeed, appellant concedes, and the district court found, that he received the amount of money which would have constituted severance pay (F. 2, R. 88). Clearly, this payment to appellee was erroneous, and an indebtedness to the United States in the amount of the overpayment, i.e., \$10,065, arose.

Prior to this litigation, even appellee apparently doubted his entitlement to the amounts he received in excess of readjustment pay. For in his tax return for the year 1958, he did not report the overpayment as income, explaining to the District Director of the Internal Revenue Service that GAO had made demand for its return (Pl. Ex. 4).

The foregoing evidence constituted an adequate showing of erroneous payment to appellee of severance pay, rather than readjustment pay and his consequent indebtedness to the United States. Plainly, the district court was wrong in ruling otherwise.

- B. The Medical Evidence Rebuts Any Inference Either That a Determination of Appellee's Entitlement to Disability Separation And Severance Pay Had Been Made Or That Appellee's Physical Condition Entitled Him to Such a Determination.
-

The Government having presented a strong prima facie case, the burden should then have been on appellee to come forward with

evidence to establish his entitlement to disability severance pay equal to the amount of severance pay received by him.^{9/} Most certainly it should not be on the Government to establish the negative proposition that appellee was not entitled to disability severance pay. Cf. Selma, R & D. Co. v. United States v. Denver & R.G.R.R., 191 U.S. 84, 91-92; Fleming v. Harrison, 162 F. 2d 789, 792 (C.A. 8); Logan v. Freerks, 14 N.D. 127, 103 N.W. 426.

However, because the district court was of the view at the first trial that the appellee did not have the burden of going forward with evidence of his entitlement to retain the overpayment (Tr. I 87), and because this court did not pass on the question of burden of proof on the first appeal (R. 86), the Government assumed and, we submit, successfully met the burden at the second trial of establishing nonentitlement here.

The Government introduced appellee's complete service medical records, including the medical report of appellee's pre-release physical examination. That report stated that as of the time of the examination (September 10, 1958), no physical defects were found and appellee was "qualified for active duty at sea

^{9/} It is perfectly clear from the record that appellee failed to meet this burden. He testified only that he had chronic sinusitis at the time of his release from active duty. He introduced no evidence whatsoever of any finding of disability by any qualified person nor, indeed, did he introduce evidence that he had been separated from the service. He stated on cross-examination that he did not know whether he had ever been examined by a medical board relative to his alleged disability prior to his release from active duty (Tr. I 47-49, 64).

and/or foreign shore and for RAD"^{10/} (Pl. Ex. 12). And the Government's expert witness, Dr. Morris, testified that he had reviewed the medical record and found nothing to indicate disability upon appellee's release from active duty (Tr. II 40-41). Dr. Morris noted that the medical record was devoid of sick call entries after March 6, 1958 (when appellee complained of a sore throat) (Tr. II 46). Dr. Morris also noted the absence in the release physical examination report of any complaints by appellee as to his physical condition (Tr. II 47). Dr. Morris stated unequivocally that had appellee made any complaint it would have been recorded (Tr. II 47). It was the doctor's opinion that appellee was not disabled (Tr. II 49). This evidence compels the conclusion that appellee had not been found disabled at the time of his release from active duty, and obviously was not eligible for disability severance pay.^{11/}

Other evidence in the record establishes, in addition, that no determination of disability by the Secretary of the Navy had ever been made. Such a determination is, of course, prerequisite to disability discharge and the payment of disability severance

^{10/} "RAD" stands for release from active duty.

^{11/} Though the district court adopted counsel for appellee's proposed findings that the report of appellee's pre-release finding erroneously referred to appellee as master sergeant and provide no evidence as to his physical condition (R. 90), it is clear from the fact that appellee's proper service number (047192) and date of birth (9-21-24) are correctly stated that the certified medical records introduced by the Government are indeed appellee's service medical records (Pl. Ex. 12).

pay, 10 U.S.C. 1203, infra, p. 1a . Department of the Navy regulations implementing 10 U.S.C. 1203, in effect at the time of appellee's release from active duty, required that a member of the service claiming disability be evaluated by a Physical Evaluation Board (PEB). Naval Supplement to Manual for Courts-Martial United States 1951, pars. 0901, 20 Fed. Reg. 9996. The PEB's recommended findings would then be reviewed by the Physical Review Council. Id. at pars. 0913^{12/}1, 0934, 20 Fed. Reg. 10000, 10001. Only after these preliminary steps were completed could the record be transmitted to the Secretary of the Navy for his determination. Id. at pars. 0935^{12/}b, 0961, 20 Fed. Reg. 10002, 10003.

The record is devoid of any evidence that this elaborate and necessary machinery for the making of disability determinations was ever utilized in appellee's case. Dr. Morris testified that appellee's medical record revealed no indication that he had ever been examined or evaluated by a Medical Board (Tr. II 47-48). More affirmatively, appellee himself admitted that he had not been processed for disability when he wrote to GAO, "... I was a fool not to have insisted upon appearance before a disability examining board prior to my release after eleven years of active

^{12/} These regulations are little different from their immediate predecessors. See 32 C.F.R. 725.1, 725.2, 725.8, 725.9, 725.18, 725.22(a), 725.30(a) (1954 Rev.). Little subsequent change has been made in these regulations. See 32 C.F.R. 725.301-725.702 (1966 Cum. Supp.).

duty ..." (Pl. Ex. 5, p. 4). This evidence compels the conclusion that the Secretary of the Navy never made the required determinations that (1) appellee was unfit to perform the duties of his office, grade, rank or rating because of physical disability; (2) appellee's condition was or might be of a permanent nature; and (3) the alleged disability was less than 30 percent under the standard schedule of rating disabilities employed by the Veterans' Administration, 10 U.S.C. 1203. The district court's contrary Findings of Facts Nos. 11 and 16, made in the face of its own acknowledgement in the record that "[t]here is nothing here to show that he was separated because of disability. The record doesn't show that." (Tr. II 69)^{13/} are clearly erroneous and may not stand.^{14/}

C. The Government Is Entitled to Recover Erroneous Disbursements of Public Funds From the Treasury And It Is of No Consequence That the Financial Records of Such Erroneous Disbursements Appear Regular on Their Face.

In the preceding sections of this argument, we have demonstrated clearly the erroneous payment to appellee of severance

^{13/} These findings were prepared by counsel for appellee and were adopted verbatim by the district court. They demonstrate the difficulty of reflecting the workings of the court's own mind and necessarily carry lesser weight than findings "drawn with the insight of a disinterested mind." United States v. El Paso Gas Co., 376 U.S. 651, 656-657. See Seminars for Newly Appointed United States District Judges (1963), p. 166 (remarks of Judge J. Skelly Wright.)

^{14/} If appellee seriously contends that he did, in fact, have a disability warranting disability separation with severance pay at the time of his release from active duty, his recourse was to petition the Naval Board for the Correction of Military Records to correct his records to reflect a proper disability separation. See 10 U.S.C. 1552; Sohm v. Dillon, C.A.D.C. Nos. 18771 and 19014, June 16, 1966. Appellee has, to the best of our knowledge, never sought such relief.

pay upon his release from active duty and his nonentitlement under his own theory of disability to retain the overpayment. It should follow that the Government is entitled to judgment in the amount of the overpayment, plus interest.

However, the district court, in refusing judgment for the United States, developed the novel theory that appellee was entitled to rely upon his pay record encompassing the overpayment, apparently because the computation of severance pay was correct on its face. As the court said (Tr. II 83):

It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the Government, and unless the Government can show that there has been an absolute mistake, 15/ why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later. 16/

The district court's theory would apparently preclude the Government (at least in the case of servicemen) from recovering erroneous disbursements where the error is one of legal entitlement provable only by evidence extrinsic to the Government's finance records and not one of simple computation.

This theory is, in a word, incorrect. It is settled law that the Government has the right to recover public funds

15/ The court did not explain precisely what it meant by an "absolute mistake" but from the context of its remarks, it would appear that the court meant a patent error on the face of the Government's records. See Tr. II 14-15.

16/ Here, the Government called upon appellee to return the erroneous payment just slightly more than four months after its disbursement (Pl. Exs. 3 and 6).

mistakenly disbursed by its agents. E.g., United States v. Wurts, 303 U.S. 414; Wisconsin Central R.R. v. United States, 164 U.S. 190; United States v. Burchard, 125 U.S. 476; Kingman Water Co. v. United States, 253 F. 2d 588, 590 (C.A. 9); J. W. Bateson Co. v. United States, 308 F. 2d 510 (C.A. 5); Weiss v. United States, 296 F. 2d 648 (C.A. 5); Heidt v. United States, 56 F. 2d 559 (C.A. 5), certiorari denied, 287 U.S. 601. And it does not matter that the Government's finance records may appear correct on their face as to the computation of the payments involved. See United States v. Burchard, supra; Heidt v. United States, supra. Discussion of but two cases is necessary to indicate that service personnel are not entitled to rely on their pay records to defeat Government recovery of overpayments.

In United States v. Burchard, 125 U.S. 176, an assistant naval engineer was retired on furlough pay and not the normal retirement pay of 75 percent of sea pay because his disability was found by the retirement board not to have resulted as an incident of his service. After this determination became final, the Secretary of the Navy certified that the officer's incapacity was incident to his service, thereby rendering him eligible to be transferred from the lesser paying furlough list to the retired pay list. However, when placed on the retired pay list under these circumstances, the service member was entitled to only one-half his sea pay and not the normal three-quarters of sea pay. See Potts v. United States, 125 U.S. 173. Nevertheless,

the disbursing officer paid the officer three-quarters of his normal sea pay from October 26, 1874 through April 1, 1878, when the error was discovered. The officer sued for a continuance of three-quarters pay and the United States counterclaimed for the total amount of past overpayments.

In this situation, strikingly similar to the one at bar, the Supreme Court ruled that the United States could recover the amount of overpayment, saying (125 U.S. at 180-181):

His [the officer's] pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law, and he has no right to keep what he thus obtained This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected.

And in Heidt v. United States, 56 F. 2d 559 (C.A. 5), the United States obtained recovery of overpayment of longevity pay made to an Army officer on the inactive list between July 1, 1922 and January 1, 1929. The overpayment had been caused by the improper inclusion in the officer's longevity period of his time on the inactive list between two separate and distinct periods of active duty. In affirming the judgment of the district court in favor of the United States, the Fifth Circuit said (56 F. 2d at 560):

A voluntary payment made by an individual under no mistake of fact is ordinarily not recoverable, because he may do what he will with his own money. But the rule is quite otherwise in payments of public officers.... They have no right of disposal of the money, but must act according to law, the law operating

as a limitation on their authority to pay. The party receiving an illegal payment is bound to know the law, and ex equo et bono is liable to refund it.

That the Government was not limited to recovering erroneous disbursements patent on their face seems clear from the Fifth Circuit's reference to the facts that the officer's service records at all times obtainable from the War Department and that the records disclosed the full facts governing the officer's entitlement. 56 F. 2d at 560.

Thus, the Government having demonstrated an erroneous payment to appellee and his lack of entitlement to retain the overpayment, the district court should have entered judgment for the United States in the amount of the overpayment, plus interest. It's theory for doing otherwise is in direct conflict with settled law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded to the district court with directions to enter judgment for the United States.

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August 1966

CERTIFICATE OF COMPLIANCE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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A P P E N D I X

APPENDIX

Title 10, United States Code provides in pertinent part:

§ 1203. Regulars and members on active duty for more than 30 days: separation.

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training) under section 270(b) of this title for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the member may be separated from his armed force, which severance pay computed under section 1212 of this title, if the Secretary also determines that --

(1) the member has less than 20 years of service computed under section 1208 of this title;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence;

(3) based upon accepted medical principles, the disability is or may be of a permanent nature; and

(4) either --

(A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, and the disability was (i) the proximate result of performing active duty, or (ii) incurred in line of duty in time of war or national emergency;

(B) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the

Veterans' Administration at the time of the determination, and the member has at least eight years of service computed under section 1208 of this title; or

(C) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, the disability was neither the proximate result of performing active duty nor incurred in line of duty in time of war or national emergency, and the member has less than eight years of service computed under section 1208 of this title on the date when he would otherwise be retired under section 1201 of this title or placed on the temporary disability retired list under section 1202 of this title.

However, if the member is eligible for transfer to the inactive status list under section 1209 of this title, and so elects, he shall be transferred to that list instead of being separated. Aug. 10, 1956, c. 1041, 70A Stat. 92; Sept. 2, 1958, Pub. L. 85-861, § 1(28)(A), 72 Stat. 1451.

§ 1212. Disability severance pay.

(a) Upon separation from his armed force under section 1203 or 1206 of this title, a member is entitled to disability severance pay computed by multiplying (1) his years of service, but not more than 12, computed under section 1208 of this title, by (2) the highest of the following amounts:

(A) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when he is separated and (ii) in the grade and rank in which he was serving on the date when his name was placed on the temporary disability retired list, or if his name was not carried on that list, on the date when he is separated.

(B) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in any temporary grade or rank higher than that described in clause (A), in which he served satisfactorily as determined by the Secretary of the military department or the Secretary of the Treasury, as the case may be, having jurisdiction over the armed force from which he is separated.

(C) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination for promotion.

(D) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the temporary grade or rank to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination for promotion, if his eligibility for promotion was required to be based on cumulative years of service or years in grade.

(b) For the purposes of subsection (a), a part of a year of active service that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

(c) The amount of disability severance pay received under this section shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any

law administered by the Veterans' Administration. However, no deduction may be made from any death compensation to which his dependents become entitled after his death. Aug. 10, 1956, c. 1041, 70A Stat. 98.

The Navy Comptroller's Manual provides in pertinent part:

Paragraph 044187 Disability Severance Pay.

1. ENTITLEMENT.

a. General. Under the provisions of the Career Compensation Act of October 12, 1949 (63 Stat. 820; 37 U.S. Code 273), members may be separated (discharged) from the service for physical disability under certain circumstances. Members separated for physical disability will be entitled to disability severance pay if such entitlement is specified in the separation orders. In the case of such members separated while on the active list, payment of the disability severance pay will be made by the disbursing officer carrying the Military Pay Record (DD Form 113) of the member at the time of separation. In the case of members discharged while on the temporary disability retired list, payment of the disability severance pay will be made by the Navy Finance Center (Special Payments Department) or the Commandant of the Marine Corps (CDC).

b. Computation. Disability severance pay will be computed by the following formula and in accordance with the instructions in this subparagraph.

"Monthly basic pay by 2 by number of years of active service = severance pay."

Basic pay to be used in the computation of disability severance pay will be based on the highest rank, grade, or rating in which the member served satisfactorily as determined by the Secretary of the Navy and the cumulative years of service of the member concerned for basic pay purposes. Such rank, grade, or rating will be specified in the separation orders. The years of active service to be used in the computation of disability severance pay will be determined from information contained in the separation orders which will specify the years of active service as of a specified date. Any time lost for basic pay purposes subsequent to the date specified in the separation orders will be considered as time lost for computation of active service between such date and the date of discharge. The commanding officer

of the activity at which separation is effected will furnish to the disbursing officer carrying the pay record of the member concerned at the time of separation a statement showing the total active service through the date of separation if the separation orders specify years of active service as of a different date. In determining years of active service to be used in the computation of disability severance pay (as distinguished from cumulative years of service for basic pay purposes), a fraction of one-half year or more of active service will be counted as a whole year. A member who has not completed six months active service at the time of separation is not entitled to disability severance pay. Disability severance pay may not exceed an amount equal to two years' basic pay. Therefore, 12 years is the maximum active service that can be included in the formula for computation of disability severance pay. The following example illustrates the computation of severance pay.

* * *

1955 Naval Supplement to the Manual for Courts-Martial
United States, 1951, provides in pertinent part:

[Effective December 1, 1955]

Paragraph 0901. Function. -- Physical evaluation boards are constituted to afford full and fair hearings incident to evaluation of the physical fitness of certain members and former members of the naval service to perform the duties of their rank, grade or rating; to investigate the nature, cause, degree and probably permanency of disabilities presented by such parties; and to make recommended findings appropriate thereto. No member of the naval service shall be separated or retired by reason of physical disability from an active duty status without a hearing before a physical evaluation board unless such hearing is waived by the member concerned. No member of the naval service shall be separated or retired by reason of physical disability from an inactive duty status without a hearing before a physical evaluation board if

such member shall demand it. As used in this chapter, a "member of the naval service" shall include any commissioned officer, chief warrant officer, warrant officer, naval aviation cadet, or enlisted person, including a retired person, of the Navy and Marine Corps, the Reserve components thereof, the Fleet Reserve and Fleet Marine Corps Reserve.

Paragraph 0913. General Instructions.

* * *

1. Preparation, authentication and forwarding of record. -- The record of proceedings of a physical evaluation board shall be prepared in accordance with Chapter III insofar as applicable. After authentication, such record, together with all documents which were before the board, including a rebuttal, if filed, shall be transmitted to the Physical Review Council. A copy of the record of proceedings shall be furnished the party or his counsel. The recipient of such copy of the record of proceedings shall give a dated receipt therefor.

* * *

Paragraph 0935. General Instructions.

a. Procedure. -- After consideration of all the evidence concerning a case before it, and in the light of established medical and legal principles and personnel policies, the member of the Physical Review Council shall advise the Secretary of the Navy that they concur in the recommended findings of the physical evaluation board or that they do not

concur, in whole or in part, in such recommended findings. In the latter case they shall, in lieu of the recommended findings in which they do not concur, present substitute or additional recommended findings for the consideration of the Secretary of the Navy, together with the basis for their action as prescribed for physical evaluation boards in section 0913g where the basis is not otherwise adequately set forth in the record of proceedings. In the event of disagreement between the individual members of the Council with respect to any aspect of a case, each member shall set forth in the report of the Council his views with respect to those aspects in which there is disagreement. The Council may, on its own initiative, take no action on the recommended findings of the physical evaluation board and return the case to a medical board for further study, to the physical evaluation board for a hearing in revision for correction of errors, for further development of the case, for reconsideration of its recommended findings, or to a different physical evaluation board for another hearing, or to a physical evaluation board in a different area for another hearing.

b. Authentication and Forwarding of Records. -- Action by the Physical Review Council on a record of proceedings of a physical evaluation board shall be prepared in appropriate form and shall be signed by all members and by the recorder. Cases not returned to a medical board or a physical evaluation board shall be forwarded to the Secretary of the Navy or referred to the Physical Disability Appeal Board, as appropriate.

* * *

Paragraph 0961. Action By the Secretary of the Navy.

After considering the entire record of a physical evaluation board case, the Secretary of the Navy will make determinations in conformity with the applicable law and will direct the disposition of the party whose case has been considered

Marine Corps Order 1900.1B provides in pertinent part:

[Effective date November 8, 1956]

3. Release of Reserve Officers from Active Duty.

* * *

j. Lump-Sum Readjustment Payment for In-
voluntary Release from Active Duty.

(1) A reservist who is involuntarily released from active duty is entitled to a lump-sum readjustment payment, provided that he has completed at least five years' continuous active duty prior to such release with no breaks in service of more than 30 days. This payment will be computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. For the purpose of computing the amount of readjustment payment, the following factors are applicable:

(a) A part of the year that is six months or more is counted as a whole year.

(b) Less than six months is disregarded.

(c) Any prior period for which severance pay has been received under the provisions of law shall be excluded.

* * *

(2) Personnel in the below-listed categories are not entitled to lump-sum readjustment payment:

* * *

(e) When, upon release from active duty, the reservist will be immediately eligible for severance pay based on his military service under any other provisions of law. However, he may elect to receive readjustment pay or severance pay, but not both.

(f) When, upon release from active duty, the reservist will be eligible for disability compensation under laws administered by the Veterans Administration. However, he may elect to receive disability compensation or readjustment pay, but not both. Election of readjustment pay will not deprive him of any subsequent compensation to which he may become entitled

on the basis of subsequent service, under laws administered by the Veterans Administration.

(3) The following will be included in orders to release from active duty:

(a) A statement of entitlement to lump-sum readjustment pay or entitlement to elect either readjustment pay, severance pay, or the separation pay provided by law for involuntary release prior to the expiration of a standard written agreement.

(b) The number of years of active service for which lump-sum readjustment pay is payable and the amount of any previous mustering-out payment; if none, so state.

(c) A signed certificate that becomes a part of the orders for separation that states "Having been advised that I may not receive either disability severance pay from the Marine Corps or disability compensation from the Veterans Administration in addition to readjustment pay, I hereby elect to receive lump-sum readjustment payment."

(4) Exceptions:

* * *

(d) A reservist serving on active duty under standard written agreement, and who is involuntarily released from active duty before completing his agreed term of service, may elect, in lieu of separation payment as heretofore provided, to receive readjustment pay.

(5) Miscellaneous:

(a) Readjustment payments are subject to withholding tax and are available for liquidation of indebtedness to the Government.

(b) The term "Involuntary Release" shall include release under conditions wherein a reservist has completed a tour of duty

and the Commandant does not accept his voluntary request for further retention.

* * *

(d) A person who receives readjustment pay is not entitled to mustering-out pay under the Mustering Out Payment Act of 1944, or under the Veterans Readjustment Assistance Act of 1952. Mustering-out pay previously received under these Acts is deducted from any lump-sum readjustment pay.

(e) An entry will be made in item 32 of Department of Defense Form 214 (DD Form 214) stating the nature, amount and date of the lump-sum readjustment payment.

(f) The Commandant will determine, in the case of officers, eligibility for lump-sum readjustment payment.

* * *

c. Physical Examination Prior to Release from Active Duty. Within 72 hours prior to release, each reservist shall be physically examined and a report thereof submitted in accordance with paragraphs 15-48, 15-49 and 15-76(2), of the Manual of the Medical Department, U. S. Navy.

TABLE OF EXHIBITS

<u>PLAINTIFF'S EXHIBIT NUMBER</u>	<u>DESCRIPTION</u>	<u>IDENTI- FIED</u>	<u>OFFERED</u>	<u>REC</u>
1	(a) Basic active duty agreement between the Government and defendant, and extensions thereof. (b) Order releasing Pederson from active duty and speedletters of Commandant of Marine Corps authorizing payment of readjustment pay.	4	5	5
2	Pay record with entry showing credit for severance pay together with other entries (credits and debits) which form the basis for computing the amount actually paid - \$12,465.17.	4	5	5
3	Government check in sum of \$12,465.17 payable to and endorsed by defendant.	4	5	5
4	(a) Defendant's tax return for 1958.	4	5	5
5	Letter from Pederson to General Accounting Office containing statements generally inconsistent with position at trial. The letter admits that he did not appear before a disability examining board.	4	5	5

TABLE OF EXHIBITS (continued)

<u>PLAINTIFF'S EXHIBIT NUMBER</u>	<u>DESCRIPTION</u>	<u>IDENTI- FIED</u>	<u>OFFERED</u>	<u>RECEIVED</u>
6	Letter from Head, Examination Branch, Disbursing Division, Headquarters Marine Corps, detailing basis of erroneous payment.	4	5	5
7	Letter from defendant in response to Exhibit 6.	4	5	5
8	Letter similar in content to Exhibit 6. Attachment to letter of 17 February 1959 shows in concise form credits and debits leading to overpayment.	4	5	5
9	Certificate of Comptroller General reciting basis for overpayment.	4	5	5
10	Marine Corps Order 1900.1B, effective November 8, 1956.	5	5	5
11	Navy Comptroller's Manual including paragraph 044187 governing entitlement to disability severance pay.	5	5	5
12	Complete service records of appellee, including medical report of pre-release physical examination.	39	39	40

No. 20929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM D. PEDERSEN,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE DEFENDANT-APPELLEE.

FILED

SEP 22 1966

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WM. B. LUCK, CLERK

FEB 15 1967

NOV 4 1966

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No. 20929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM D. PEDERSEN,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE DEFENDANT-APPELLEE.

Jurisdictional Statement.

This action was commenced by the United States, pursuant to 28 U.S.C. 1345 upon complaint alleging an erroneous payment of severance pay to defendant-appellee upon his release from the United States Marine Corps. A judgment for defendant was entered on February 15, 1966 [R. 92]. Notice of appeal was filed on April 5, 1966 [R. 93]. This court has jurisdiction to entertain the appeal pursuant to 28 U.S.C. 1291.

Statement of the Case.

On September 15, 1958, appellee was separated from the United States Marine Corps, and was paid \$12,465.17 by check which represented all monies due him including his earned basic pay, subsistence allowance, quarters allowance, mileage allowance, severance pay, and unused leave pay [Tr. 124]. On January 19, 1959, by letter [Pltf. Ex. 6], the Marine Corps demanded \$10,065.00 from appellee explaining that an administrative examination section of the Marine Corps had determined this to be an overpayment. On February 7, 1959, appellee answered this demand by letter [Pltf. Ex. 7] which took exception to the Marine Corps' demand, and offered to accept a limited recall to active service to prove his entitlement to severance pay. The Marine Corps refused this offer, and in the same letter admitted that the appellee had actually not been paid all of the \$13,220.00 severance pay but merely that such sum had been credited on the appellee's pay record [Pltf. Ex. 8]. Following this, in June 1959, appellee wrote to the General Accounting Office offering his cooperation, but specifically explaining, irrespective of any final determination as to his entitlement or nonentitlement to severance pay, that the Marine Corps' demand for \$10,065.00 was erroneous in that it was merely charged to appellee on the Marine Corps accounting system, and that a considerable portion of that sum had actually been disbursed to the United States Tax Collector, allegedly on behalf of appellee [Pltf. Ex. 5]. Appellant has never denied this.

Notwithstanding the foregoing, appellee was sued by appellant in March 1961, Civil. No. 367-61-HW, the complaint demanding the full sum with interest from January 19, 1959. At the pre-trial hearing in the matter on October 3, 1961, appellant expressed doubts regarding the merits of its claim and the suit was ordered dismissed without prejudice [Ex. "A" to Motion to Dismiss Appeal dated November 18, 1964, on file in this court]. The present case, filed May 20, 1963 was initially tried in the lower court on January 17, 1964, the appellant again demanding \$10,065.17 with interest from January 19, 1959. The initial trial having resulted in a judgment for appellee, an appeal was taken, resulting in a reversal in this court which remanded "for a new trial which will permit each side to offer the evidence it believes should be considered by the trial court" [R. 86].

At the instant trial, the parties stipulated to the admission of all evidence admitted at the first trial [Tr. III 4]. Appellant introduced new Plaintiff's Exhibit 10, Marine Corps Order 1900.1B, Plaintiff's Exhibit 11, Navy Controllers Manual, and Plaintiff's Exhibit 12, which was offered as a complete copy of appellee's service medical record. The appellant called a Navy Finance Officer as an expert witness who testified *inter alia* that the computation of severance pay in appellee's pay record was correct [Tr. III 31], that according to statute of the Congress of the United States payment of severance pay was only proper if specified in

appellee's orders [Tr. III 24]. Although the witness testified that appellee's release orders were separation orders [Tr. III 27], on cross-examination the witness stated that a waiver which is required by Marine Corps Order 1900.1B [Pltf. Ex. 10] to be included in orders of separation cannot be found in appellee's release orders [Tr. III 30]. The appellant called a Senior Naval Medical Officer as an expert witness who testified from the medical record of appellee [Pltf. Ex. 12], and detailed appellee's service medical history particularly with regard to sinusitis, associated respiratory problems, and treatments given, also testified that if appellee had had a cold at the time he was grounded, due to atmospheric changes, that could affect his sinuses [Tr. III 53]. The witness further commented on the frequent and chronic respiratory infections, nasal trouble and some with his sinuses, but commented that based upon all the record, including the entry of September 10, 1958, disability was not reflected [Tr. III 48].

Following arguments, the court again expressed dissatisfaction with the state of the evidence and accordingly entered judgment for appellee. Again the Government has appealed.

Argument.

Appellant's specification of error 1 asserting that the district court erred in holding that the Government had failed to establish by the evidence its entitlement to recover judgment against appellee is completely without merit. Had the district court been satisfied with all of the other evidence presented by the Government, which the court obviously was not, it would still have found it virtually impossible to give a judgment to the appellant owing to the financial accounting proof presented by the appellant. On page 13 of appellant's brief on appeal, appellant states that appellee received \$13,220.00 severance pay upon his release from active duty in 1958. That statement is incorrect. This court need only refer to appellant's own evidence to observe this. Plaintiff's Exhibit 8, a letter from the Marine Corps to appellee dated February 17, 1959, in paragraph 3 the following statement appears: "In my previously mentioned letter I indicated that you received the amount of \$13,220.00. The intent here was to reflect the amount credited on your pay record for severance pay, not the amount received." This was commented upon at the first trial by the district court as follows: "Now, the government says in its complaint that it is entitled to \$10,065. In other words, the government contends that the defendant was entitled to \$3,185.00, I believe it is, and so they have deducted that from the amount set forth, \$13,220.00, and they come up with a figure of \$10,065. The government absolutely disregards the \$2,624.10 withheld by the government and paid over to

the Internal Revenue Department. The government takes the position that the defendant received \$13,220.00. He didn't. He received \$13,220.00 less possibly \$2,624.10 on withholding tax. In one of the letters written by the defendant to the government, the defendant calls attention to the fact that this money was withheld. The government evidently took the position, 'Well, that's just too bad. We want the entire amount. If we withheld anything illegally or unlawfully, then you can make a demand upon Internal Revenue and you can get it back, if you can.' " [Tr. II 89]. The Government did not introduce any new evidence at the second trial to resolve the obvious discrepancies between its evidence and its demands, so the question remains problematical, and judgment for appellant would have been difficult if not impossible under any circumstances. It also follows that, from 1958 to the present date the government has still not made a proper demand on the appellee for any sum of money which it actually did pay to him.

More cogent reasons than the above exist for the district court's not having found for the appellant, however.

Although Title 10, Section 1203, U.S.C., when considered with the other evidence in this case, allowed a person in appellee's category separation with severance pay upon a determination of entitlement thereto by the Secretary of the Navy, the only evidence, basically, which was introduced by appellant to refute entitlement to severance pay was a faulty set of appellee's release orders and an incomplete medical record.

The Navy Controllers Manual [Pltf. Ex. 11] states in part, "Members separated for physical disability will be entitled to disability severance pay if such entitlement

is specified in the separation orders.” It should be noted that the Manual does not prescribe that this is the only means by which entitlement to disability severance pay is determined, nor could it since such power vests in the Secretary of the Navy, not in the Controller. But appellant, in attempting to show nonentitlement of the appellee to severance pay, has introduced appellee’s release orders [Pltf. Ex. 1] and contended that there are separation orders in order to show that as separation orders, they do not contain a statement of entitlement to severance pay, thus creating an inference that the Secretary of the Navy had not determined entitlement to severance pay. However, Marine Corps Order 1900.1B [Pltf. Ex. 10] para. j(3)(c) recites as follows:

“The following will be included in orders to release from active duty: A signed certificate that becomes a part of the orders for separation that states ‘Having been advised that I may not receive either disability severance pay from the Marine Corps or disability compensation from the Veteran’s Administration in addition to readjustment pay, I hereby elect to receive lump-sum readjustment payment.’ ”

Examinations of appellee’s release orders [Pltf. Ex. 1] will show no such certificate, and since the subject matter of this certificate goes to the very heart of the question of entitlement to severance pay or only readjustment pay, its omission casts serious doubt as to their being considered the separation orders contemplated by the Navy Controllers Manual.

Appellant’s other new evidence at the instant trial was a copy of what appellant describes as a complete

medical record of appellee. This exhibit [Pltf. Ex. 12] details a history of sinusitis and related chronic respiratory infections from 1953 through 1958 that very closely corroborates the testimony of appellee [Tr. II 46-54]. The last entry in 1958 shown in this medical record, however, is dated September 10, 1958, and it depicts no disability; but there is some confusion regarding this inasmuch as one page of the exhibit indicates that the examinee was a Master Sergeant in the U.S. Marine Corps as distinguished from U.S. Marine Corps Reserve. There is no indication in the record that the appellee has ever been a Master Sergeant in the U.S. Marine Corps. What is more important about this exhibit is that there is apparently no record of appellee's final medical examination in the record. Marine Corps Order 1900.1B [Pltf. Ex. 10] para. 3.c. states: "*Physical Examination Prior to Release From Active Duty*. Within 72 hours prior to release, each reservist shall be physically examined and a report thereof submitted in accordance with paragraphs 15-48, 15-49 and 15-76(2), of the Manual of the Medical Department, U. S. Navy." The uncontradicted evidence in this case is that appellee was separated on September 15, 1958 some five days after the date of the last 1958 medical entry in the exhibit. The results of his examination within 72 hours of his release are simply missing.

The appellant may believe that the person who disbursed severance pay to appellee failed to follow regulations, that the person who audited appellee's pay record erred, that regulations were not followed in failure to include the all-important waiver of severance pay in appellee's orders, and that contrary to regulations, there was no medical examination of appellee within 72 hours

of his release, but the district court was, understandably, looking for proof and not supposition. Also, it should be noted, contrary to the contention of appellant's Navy Finance Office expert witness that U.S. statutes require entitlement to severance pay to be specified in separation orders, no such statute is to be found.

Proceeding to appellant's specification of error 2, having failed to produce any direct evidence to prove that a mistake had been made in appellee's pay record [Pltf. Ex. 2], and appellant's inferential evidence having proved defective, it is now contended that the burden of proving the case should have been placed upon appellee. The appellant, by its complaint, and by the audited pay record of appellee [Pltf. Ex. 2] has shown that severance pay was paid to appellee. Appellee has concurred with this fact. With this specification of error, appellant is contending that appellee's concurrence with appellant's records shifts the burden to appellee to prove that those government records are correct. A detailed discussion of the cases appellant has cited in support of this unusual contention is not seen as necessary; the holdings in *Selma, R&D Co. v. U.S.*, 35 L. Ed. 266; *United States v. Denver & R.G.R.R.*, 48 L. Ed. 106; *Fleming v. Harrison*, 162 F. 2d 789, and *Logan v. Freerks*, 103 N.W. 127, are all typified by the United States Supreme Court holding in the *Selma* case as follows: "The burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant." That the actions which have been taken by appellant lie more within appellant's knowledge than appellee's is beyond question.

Appellant's specification of error 3 directed to the district court's finding that the Secretary of the Navy had determined that appellee was eligible for and entitled to severance pay, merits discussion. As the district court remarked to counsel during the course of the trial, "There is nothing here to show that he was separated because of disability. The record doesn't show that." [Tr. III 69]. That is certainly true. There was absolutely no direct evidence one way or the other before the district court which would have set the question at rest. The appellant had produced no direct evidence on the question, and therefore it is necessary to proceed from the one unassailable document which was in evidence to the only logical conclusion. Appellee's pay record [Pltf. Ex. 2] was introduced by appellant, and both of appellant's expert witnesses testified that it was computed correctly. Colonel McKean's testimony was, "First, looking at Exhibit 2, this pay record was closed out, as we call it, all credits were extended of the Major's basic pay, his subsistence allowance, his quarters allowance, his mileage allowance, severance pay, 60 days lump sum leave settled for, unused leave. The same thing was done for his income tax. His pay record was then balanced and the net amount due him was \$12,465.17, for which a check was drawn to his order on the 14th of September, the day before his release from active duty was effected." [Tr. II 24]. From the audited pay record, proper on its face, and from the fact of payment of severance pay, appellee believes several time-tested presumptions support the district court's finding regarding the Secretary of the Navy's determination of appellee's eligibility and entitlement to severance pay. In *American Railway Express Co. v.*

A. J. Lindenburg, 260 U.S. 584, 67 L. Ed. 414, the U.S. Supreme Court held, "When an act is done which could be done legally only after the performance of some prior act, proof of the latter carries with it the presumption of the due performance of the prior act." Accord: *Hook v. St. Louis Pub. Serv. Co.*, 296 S.W. 2d 123, "Facts consistent with legality are presumed to exist". In *R. H. Stearns Co. v. U.S.*, 291 U.S. 54, 78 L. Ed. 647, the United States Supreme Court held: "Acts done by a public officer which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." And when the district court commented, "It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the government, and unless the government can show that there has been an absolute mistake, why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later." [Tr. III 83], the court may have had in mind the following United States Supreme Court holding from *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 71 L. Ed. 131:

"In the absence of *clear evidence to the contrary* (emphasis supplied), courts presume that public officers have properly discharged their official duties."

Regarding appellant's specification of error 4, the district court did not hold that persons receiving overpayments from the Government are entitled to rely on Government pay records which, although erroneous in fact and law, are not erroneous on their face. No dis-

cussion of this specification of error is considered necessary.

Appellant's specification of error 5 that the district court erred in failing to rule that the Government may recover public funds erroneously disbursed together with interest thereon is merely inappropriate to this case in view of the district court's findings that funds were not erroneously disbursed.

Conclusion.

Appellee submits that in view of all of the facts and circumstances presented, and for all of the reasons outlined in the preceding paragraphs of this brief, the district court could not have found otherwise than it did, and judgment for the defendant should be affirmed. It should be noted that appellant has been accorded three separate opportunities in the lower court to prove its case commencing early in 1961. It is believed that appellant has had its day in court.

Respectfully submitted,

ROBERT W. FRASER,

Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT W. FRASER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WILLIAM D. PEDERSEN,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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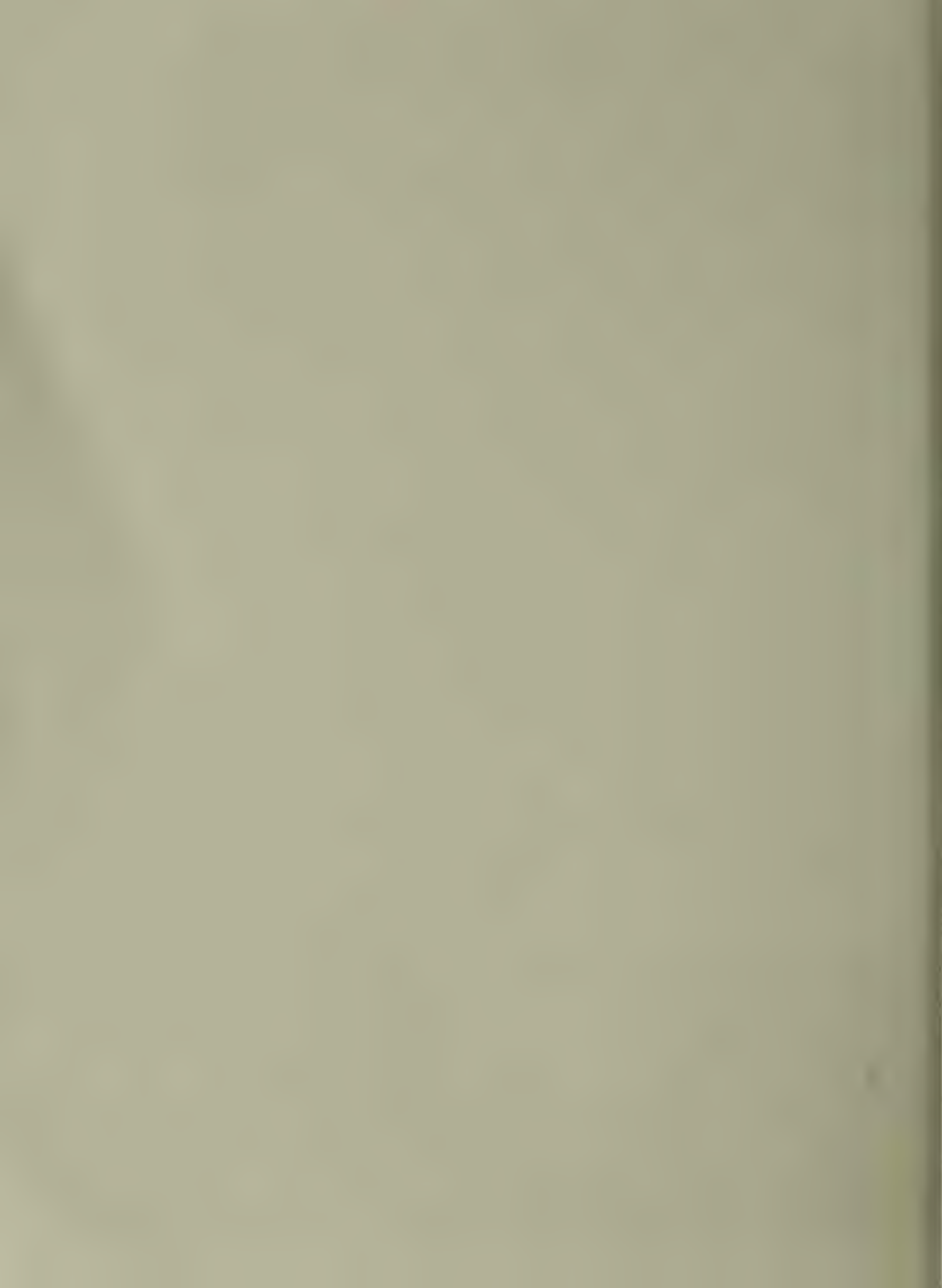
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FILED

OCT 10 1966

WM. B. LUCK, CLERK

FEB 15 1967



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,929

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WILLIAM D. PEDERSEN,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

In our main brief we demonstrated that the record in this case clearly established the erroneous payment to appellee of severance pay upon his involuntary release from active duty to a reserve status and the Government's entitlement to recover a money judgment against him.

1. Appellee suggests that he did not receive the entire \$10,065 overpayment claimed by the Government since

\$2,624.10 was withheld for federal income taxes (Brief, pp. 5-6). But that suggestion goes to the amount of the judgment due the Government, and could not justify the district court's denial of any recovery to the Government.^{1/}

Appellee also attempts to make much of the fact that the orders releasing him from active duty introduced by the Government do not include a certificate signed by him indicating his understanding that he was not entitled to disability severance pay and indicating his election to receive readjustment pay (Brief, pp. 6-7). But of what importance is the absence of this certificate when the Government has established by other competent, uncontradicted evidence in the record (see our main brief pp. 15-16) that appellee was not entitled to disability severance pay but only to the lesser readjustment pay? And of what real relevance to the issue of the Government's entitlement to recover the overpayment are the facts that on one page of appellee's medical record he is erroneously referred to as a master sergeant, when that record clearly pertains to him,^{2/} and that

^{1/} Appellee fails to note that on his 1958 Federal income tax return, he did not report the \$10,065 as income (Pl. Ex. 4).

How the money withheld as tax on this sum was handled by the Internal Revenue Service is not shown by the record. But if it was not refunded or applied against any other federal income tax indebtedness which appellee might have had, this withholding may be provided for in the money judgment which, we submit, the district court is required to make as a result of the overpayment.

^{2/} There is no doubt that the report of medical examination containing the reference to appellee's rank as that of master sergeant was in fact the prerelease medical report on appellee. (Footnote continued)

his release from active duty physical examination was administered five days rather than three days before his actual release?

If anything, these errors show that the Government officials preparing appellee's records were less than infallible, and fortify the overwhelming evidence to the effect that they erred in giving him a check for severance pay, when in fact he was not being severed from the service, but was simply being released from active duty to reserve duty.

2. Appellee, in a final effort to avoid repayment to the Government of the money erroneously disbursed to him, insists, as he did in the district court, that because he was paid severance pay and because that severance pay was correctly calculated on the face of his pay record, (considering his years of service and final monthly active duty base pay), the Secretary of the Navy presumptively determined his entitlement to disability severance pay as Title 10, Section 1203 of the United States Code requires (Brief, pp. 10-11). But assuming, without conceding that such a presumption arises from an entry, regular on its face, in a service man's pay record, any such presumption was rebutted here by the medical evidence establishing appellee's fitness for continued active duty and lack of disability at the time of his involuntary release, and by the documentary evidence showing that he was not being severed from the

2/ Footnote continued:

On the same page as the reference to the master sergeant rank appears appellee's correct service number and date of birth (Pl. Ex. 12).

service, but was simply being released from active duty to a reserve status for want of a billet in the active Marine Corps. The authorities cited by appellee in support of his position (Brief, pp. 10-11) are plainly inapposite since in none of them was evidence introduced rebutting the presumption of regularity which may have arisen.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded to the district court with directions to enter judgment for the United States.

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OCTOBER, 1966.

CERTIFICATE OF COMPLIANCE

I hereby certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harvey L. Zuckman

HARVEY L. ZUCKMAN

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No. 20,930

**United States Court of Appeals
For the Ninth Circuit**

SAN FRANCISCO MINING EXCHANGE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Petition to Review, Modify and Set Aside, and to Stay, an
Order of the Securities and Exchange Commission**

OPENING BRIEF FOR PETITIONER

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FEB 15 1967

NOV 4 1966

FILED
JUL 2 1966

WILLIAM D. LUCK CLERK

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No. 20,930

United States Court of Appeals For the Ninth Circuit

SAN FRANCISCO MINING EXCHANGE,	}
<i>Petitioner,</i>	
VS.	
SECURITIES AND EXCHANGE COMMISSION,	
<i>Respondent.</i>	}

**On Petition to Review, Modify and Set Aside, and to Stay, an
Order of the Securities and Exchange Commission**

OPENING BRIEF FOR PETITIONER

JURISDICTION

This case is before the Court on petition of the San Francisco Mining Exchange (herein sometimes called the "Petitioner") to review, modify and set aside, and to stay, an order of the Securities and Exchange Commission (herein called the "Commission"). The Commission's decision and order are reported as Securities and Exchange Act Release No. 7870.

This Court has jurisdiction under the Securities Exchange Act of 1934 as amended, 48 Stat. 881, 15 U.S.C. 78a., *et seq.* (herein called the "Act"), since petitioner was aggrieved by an order of the Commission (Securities and Exchange Act Release No. 7870), and has its prin-

cial place of business in the United States Court of Appeals' Ninth Circuit.

STATEMENT OF THE CASE

I. THE FANTASTIC PRELUDE TO THE FILING OF FORMAL CHARGES AGAINST THE MINING EXCHANGE.

A. The Commission Staff Attempted to Importune the Members of the Mining Exchange Into a Voluntary Surrender of Its Registration.

Action preliminary to the administrative proceeding was initiated on July 11, 1962 when Arthur E. Pennekamp, the Regional Administrator of the Securities and Exchange Commission, came to the headquarters of the San Francisco Mining Exchange, conferred with the members of the Mining Exchange, and delivered to its Board of Governors a photostatic copy of a letter dated June 28, 1962 that he had received from the Director of the Commission's Division of Trading and Exchanges (one Philip A. Loomis, Jr.) (Tr., pp. 1496-1499).

At the July 11, 1962 conference, when Mr. Pennekamp delivered the copy of Loomis' letter to the Mining Exchange's Board of Governors, he also showed them a copy of a report prepared by the staff of the Commission entitled "Report on the San Francisco Mining Exchange—June, 1962—Non-Public—For Staff Use Only."

Within a few days—after clearing it with Washington—he delivered a copy of this Report to the members of the Mining Exchange for their study (Tr., pp. 1499-1502).

Because of the significance of Loomis' letter we set it forth in full at this first opportunity:

"*Airmail*

June 28, 1962

Arthur E. Pennkamp, Esq.
Regional Administrator
Securities and Exchange Commission
821 Market Street
San Francisco 3, California

Re: San Francisco Mining Exchange

Dear Art:

The *Commission* has authorized us to proceed in the matter of the San Francisco Mining Exchange in accordance with our original plans. I understand also that you have received copies of the report on the Exchange as *revised in accordance with the Commission's directions*.

I suggest, therefore, that you arrange an appointment with the Board of Governors of the Exchange and then advise them, in effect, that the staff of the Commission has made a study of the San Francisco Mining Exchange as a result of which we have reached a firm conclusion that the registration of the San Francisco Mining Exchange as a national securities exchange, must be terminated. The staff recommendations have been *considered by the Commission*.

The normal consequence of this conclusion would be the initiation of a proceeding under Section 19(a)(1) of the Securities Exchange Act to withdraw the registration of the Exchange, and we are prepared to commence such a proceeding promptly. We feel, however, that the Exchange may wish to terminate its registration voluntarily in order to avoid the expense and embarrassment of public hearings.

If the Exchange wishes to take that course, it may submit withdrawal of its registration by July 15, and *the Commission* will order such withdrawal effective at an appropriate time.

The Exchange may also be advised that *the Commission does not plan* to make the report on the San Francisco Mining Exchange public at this time, but that copies are available for inspection by the Exchange. *The Commission does not wish*, however, to give copies of the report to the Exchange, since it might thereby lose control of the decision as to when and how this material might be made public.

If the Exchange withdraws its registration, it may give such reasons therefor as it sees fit, provided that they are not misleading. It should be understood, however, that while *the Commission does not plan* to make the report public at this time, the Commission may subsequently determine that it would be appropriate to do so, and the Exchange should not assume that *the Commission will not hereafter make the report*, and the reasons for the withdrawal of the Exchange's registration, public, in response to Congressional inquiry, or otherwise.

You may furnish a copy of this letter to the Exchange if you think that desirable.

If you have any questions about it, please let me know immediately when you have communicated this matter to the Exchange and when you receive any reaction from it.

Sincerely yours,
sgd Philip A. Loomis, Jr.,
Director''

Mr. Pennekamp insisted that during the July 11th conference at the Mining Exchange he urged the mem-

bers of the Exchange to obtain legal counsel to assist them in their consideration of the ultimatum presented in Loomis' letter (Tr., pp. 1497, 1550-1551). He knew that they did not have legal counsel (Tr., p. 1550). As a matter of fact, one of the eventual charges filed against the Mining Exchange was that:

"The Exchange has retained no legal counsel for about 30 years and has not had adequate legal advice during this entire period." (Order for Public Proceedings, Par. II, E(4), page 11.)

3. Legal Counsel for the Mining Exchange Is Engaged—He Seeks a Conference With the Commission Staff Concerning Rehabilitation.

Legal counsel for the Mining Exchange first appeared on the scene on July 16, 1963, when its present counsel transmitted identical wires to both Loomis and the secretary of the Securities and Exchange Commission, one Orval A. Du Bois. Since this first statement of a legal position in behalf of the Mining Exchange sets forth clearly the attitude of legal counsel for the Mining Exchange, we quote the exact wire in full (Tr. pp. 2054-2056, Resp. Exh. 9):

"Re: SAN FRANCISCO MINING EXCHANGE. SINCE MONDAY, JULY 16TH, I HAVE BEEN RETAINED AS LEGAL COUNSEL FOR THE EXCHANGE. HAD NO PRIOR KNOWLEDGE OF OR CONNECTION WITH ITS ACTIVITIES OR THOSE OF ANY SINGLE MEMBER. MET WITH A GROUP OF ITS MEMBERS YESTERDAY AND REVIEWED YOUR STAFF REPORT OF JUNE 12TH AND PHILIP LOOMIS' LETTER OF JUNE 28TH. CONFERRED THIS AFTERNOON WITH REGIONAL ADMINISTRATOR ARTHUR PENNEKAMP AND HIS STAFF. WAS ADVISED OF YOUR CONTEMPLATED WIRE ADVANCING FROM JULY 27TH TO 19TH THE DEADLINE FOR POSSIBLE VOLUNTARY WITHDRAWAL OF REGISTRATION.

MET LATER THIS AFTERNOON WITH GROUP OF MEMBERS AND AM AUTHORIZED TO ADVISE YOU AS FOLLOWS: (1)—IMPOSSIBLE FOR THEM TO REACH GROUP DECISION AS TO ADVISABILITY OF VOLUNTARY WITHDRAWAL BY THURSDAY DUE TO PRACTICAL CONSIDERATIONS. (2)—THEY ARE CALLING MEETING OF ALL MEMBERS FOR MONDAY, THE FIRST DAY WHEN ALL CAN BE PRESENT, TO REVIEW THE ENTIRE SITUATION IN OFFICIAL MEETING. PROBABLY WILL HAVE DEFINITE ANSWER BY LATE MONDAY OR TUESDAY. (3)—THEY ASSURE YOU THAT A DECISION TO SHUT DOWN EXCHANGE FOR WEEK'S VACATION WAS TAKEN WITHOUT LEGAL ADVICE BUT INTENDED AS COOPERATIVE ACT IN GOOD FAITH AND TO AVOID POSSIBLE CUSTOMERS' SUITS FOR FAILURE TO DISCLOSE DIFFICULTY WITH SEC. THEY ARE WILLING TO ACCEPT LEGAL ADVICE AS TO NECESSITY OF SUBMITTING TO COMMISSION SPECIFIC AND RIGID PLAN OF REHABILITATION, IF POSSIBLE TO BE PREPARED IN COOPERATION WITH COMMISSION STAFF. AM AUTHORIZED TO COME TO WASHINGTON FOR CONFERENCE WITH YOU OR STAFF MEMBERS IF IT WILL BE CONSTRUCTIVE. HAVE ADVISED EXCHANGE MEMBERS OF EXTREME GRAVITY OF SITUATION. AWAIT YOUR RESPONSE EITHER DIRECTLY OR THROUGH REGIONAL ADMINISTRATOR'S OFFICE."

C. The Commission Staff Refused to Discuss Rehabilitation.

Neither Loomis, the Director of the prosecuting Division of Trading and Exchanges, nor Du Bois, the Commission's secretary, acknowledged or answered the wire from the Exchange Counsel, but Loomis' Associate Director, one Irving M. Pollack sent a teletype message to Regional Administrator Pennekemp on July 18th. This message read as follows (Tr., p. 2057, Resp. Exh. 9A):

"We have telegram from Gardiner Johnson, counsel for San Francisco Mining Exchange, stating it is impossible for Exchange members present in San Francisco to reach decision by July 19th as to advisability of voluntary withdrawal; that earliest pos-

sible date for meeting of all members is July 23rd, and they will have definite answer not later than July 24th; that closing of Exchange this week was intended to avoid possible civil suit for failure to disclose difficulty with SEC; and that *they want to submit specific plan of rehabilitation if possible* Stop We understand active members now running Exchange are available at this time Stop We shall withhold our recommendation to commission only if they assure us they are recommending to membership meeting on July 23 that registration be withdrawn and that Exchange does not intend to reopen Stop *Rehabilitation impossible*. Signed Irving M. Pollack, Associate Director, Division of Trading and Exchanges."

In spite of Associate Director Pollack's flat rejection of the suggestion of a proposed plan of rehabilitation of Mining Exchange procedures (his express words were: "REHABILITATION IMPOSSIBLE"), the members of the Exchange, under the guidance of their legal counsel (who had first been engaged only a week previously), proceeded to hold the promised meeting on Monday, July 23rd.

The members first voted against the suggestion that they voluntarily withdraw the registration of the Mining Exchange as a national securities exchange. Then, they proceeded to prepare and adopt a "plan of proposed operation of the Exchange which will relieve it from past criticism by the staff of the Commission."

On July 25th counsel for the Mining Exchange forwarded to Du Bois (the SEC secretary) a letter reporting in detail upon this meeting. A copy of the letter

went to Regional Administrator Pennekamp (Tr., pp. 2069-2083, Resp. Exh. 10). This was the letter of July 25th:

“In re: San Francisco Mining Exchange.

Dear Mr. Du Bois:

As you have probably been advised, on Monday, July 23rd, the members of the San Francisco Mining Exchange met to consider the suggestion that they agree to withdraw voluntarily the registration of the Exchange, as a national securities exchange.

After considerable discussion, the members present voted to declare themselves as opposed to the voluntary withdrawal of the registration and in favor of continuing operations as a national securities exchange.

Subsequently, the members of the Exchange adopted a formal resolution declaring themselves in favor of prompt preparation and submission to the Securities and Exchange Commission and its staff of a plan of proposed operation of the Exchange which will relieve it from past criticism by the Commission's staff, and conform to the suggestions heretofore made by the staff of the Commission.

This is to inform you that yesterday the first conference was held for the purpose of discussing and formulating such a plan of approved operation of the Exchange. A number of topics of suggested reform were discussed and specific proposals for improving operations were generally agreed upon. A second meeting is to be held later this week or early next week. It is anticipated that the plan will be completely formulated by the end of next week and the intention is to send it on to your office and to the

regional administrator's office for consideration, in the hope that discussion of the proposed plan might eventually eliminate much of the criticism heretofore leveled at the Exchange operations.

Among the topics discussed was a general review and modernization of the office administrative procedures of the Exchange. This topic will be discussed further at the next conference meeting. My purpose in sending this letter is to keep you and the regional administrator's office advised of these developments, so that you might be aware of the fact that the members of the Exchange are engaged in an effort in good faith to eliminate any of the past criticisms of their operations. Within the limited time available since I was retained, it has been my effort to try and aid very materially in bringing about such a program of a general revision of the form of the Exchange activities and operations.

We will keep you advised of developments in the immediate future.

Yours very truly,
Gardiner Johnson"

D. The Charges Are Filed in the Form of the "Order for Public Proceedings."

Secretary Du Bois answered under date of July 27, 1962 (Tr., pp. 2084-2087, Resp. Exh. 12) stating in part that:

"Prior to the receipt of your letter, the Commission issued an order for proceedings under Section 19(a) of the Securities and Exchange Act of 1934 to determine whether the registration of the Exchange should be withdrawn. A copy of this order is enclosed.

“In view of the facts alleged by the Division of Trading and Exchanges, it does not appear that any proposed plan of reorganization would obviate the necessity for going forward with these proceedings.”

After the receipt of this letter from Du Bois, Regional Administrator Pennekamp advised the president of the Mining Exchange that further discussion of any program of rehabilitation was out of his hands (Tr., pp. 2091-2092).

The “Order for Public Proceedings” (which set forth the detailed charges against the Mining Exchange) was as reported in Du Bois’ letter of July 27th, issued by him as Secretary of the Commission on July 26, 1962. They were promptly served by delivery of a copy to the president of the Mining Exchange.

Consistently since the first conference on July 11, 1962 the members of the Mining Exchange have refused to terminate voluntarily its registration as a national securities exchange.

II. COUNSEL FOR THE MINING EXCHANGE SOUGHT TO EXPLORE THE POSSIBILITY OF BIAS AND PREJUDICE BY INTERROGATING THE REGIONAL ADMINISTRATOR AND BY DEMANDING PERTINENT DOCUMENTS. FAILING TO OBTAIN ANSWERS OR DOCUMENTS HE REQUESTED SUBPOENAS DIRECTED TO THE MEMBERS OF THE COMMISSION.

A. Counsel for Petitioner Seeks to Question the Regional Administrator and States the Purpose of the Inquiry.

During cross-examination of Arthur Pennekamp, the SEC Regional Administrator, on February 5, 1963, he was asked by counsel for the Mining Exchange when he had

reported to Du Bois or Loomis concerning discussions with Archie Chevrier, a suspended member of the Mining Exchange. Immediately counsel for the Commission objected, claiming that:

“This invades a province which under the recognizable standard is privileged. Conversations of that nature, internal conferences between staff members are privileged under the rule.” (Tr., pp. 1535-1536).

The Hearing Examiner sustained the objection. The following colloquy then occurred:

“Mr. Johnson: Mr. Hearing Officer, . . . may I state my purpose in pursuing this line of inquiry at this time?

Hearing Examiner Ewell: Yes, sir.

Mr. Johnson: Mr. Kennamer has objected previously, and I am aware, of course, that he intends to object to this question. I will state to the Hearing Officer that *among my purposes in pursuing this line of inquiry at this time generally is an effort to determine and demonstrate to the Hearing Officer whether or not this matter has been prejudged; whether or not the members of the Commission, members of the Securities and Exchange Commission of the United States—*

Hearing Examiner Ewell: May I interrupt?

Mr. Johnson: Yes.

Hearing Examiner Ewell: *I don't think this is a proper line of discussion at this time, until certain matters are clarified on the record, and in my own mind too. It doesn't seem to me that the objective that you mentioned is a proper one for presentation in this hearing.*

The Commission is not on trial here, and I don't think it appropriate for you to endeavor to make such

a demonstration; this is not a proper forum for it.”
(Tr., pp. 1536-1537).

There was further discussion of this problem of proof while Mr. Pennekamp was still under examination:

“Mr. Johnson: The point, Mr. Hearing Examiner, is this: I am pursuing this line of investigation with Mr. Pennekamp for the purpose of ascertaining by the questions that I have asked, and am about to ask, *whether or not this matter has in fact been prejudged by the Commission, by the consideration of evidence which is not part of the record, by consideration of matters which are actually extraneous to this hearing, and for the purpose of establishing by the competent testimony of those involved that the issue has previously been decided, and that we are in fact engaged in a pillow fight, an anticlimax, a consideration of facts which have in fact already been disposed of by the members of the Commission—*” (Tr., p. 1543, ll. 1-13).

and continuing:

“Mr. Kennamer: Now, Mr. Examiner, with respect to Mr. Johnson’s contention that the proceedings regarding the San Francisco Mining Exchange have been, to use his term, I believe, ‘prejudged,’ I am not entirely certain whether he means prejudged by counsel for the Division, whether he means prejudged by the investigative staff, or whether he means prejudged by the Commission itself, or Mr. Examiner, by the Examiner who is presiding here.

These are loose and irresponsible accusations.

Hearing Examiner Ewell: In order not to broaden the thing unduly, Mr. Johnson, you may correct me if you think I am in error, but *the whole thrust of Mr. Johnson’s remark, as I interpret it, is that the Com-*

mission itself has prejudged this case before the entry of the order, and did not refer to any particular division or office of the Commission.

Mr. Johnson: *That's correct.* May I say in support of your contention, *I used expressly 'the members of the Securities and Exchange Commission,'* and I did so deliberately. I certainly did not imply, and I trust it was not inferred that there was any accusation leveled at this hearing officer, and I am sure that the record would not support any such accusation. I was very careful in my statement to refer to the Commission.

Mr. Kennamer: May I finish my statement?

Mr. Johnson: All right.

Mr. Kennamer: With that interpretation, and with that narrowing of the charges that have been made here, I can only suggest, Mr. Examiner, that *none other than a member of the Commission could testify as to whether he has prejudged this matter.* Certainly Mr. Pennekamp can't explore the mind of any member of the Commission.

Now, if counsel for the Exchange makes such a contention, *the only avenue that I can suggest that might be available adjudication of this problem is a collateral suit against the members of the Commission.*

Hearing Examiner Ewell: *You mean in the courts.*

Mr. Kennamer: *Yes, sir; in the courts.*

Hearing Examiner Ewell: Well, I was going—

Mr. Kennamer: I don't believe the Hearing Officer could possibly make such a determination. I am certain that Mr. Pennekamp does not know whether any member of the Commission has reached a prior determination as to the merits of this proceeding.

Hearing Examiner Ewell: Well, I would presume it might be evidence if some other indirect statement about a Commissioner could be reflected in other ways,

but my problem is as to whether that area is in any degree a proper subject for investigation." (Tr., pp. 1545-7).

B. Counsel for Petitioner Indicated That He Would Be Compelled to Request Subpoenas If the Information and Documents Were Not Forthcoming.

As counsel for the Commisison persisted in objecting to questions addressed to Mr. Kennekamp relative to his communications with the Commission concerning various facets of the Mining Exchange investigation, these objections were sustained. Counsel for the Mining Exchange then indicated that, failing to obtain the facts from Regional Administrator Pennekamp, he would probably have to request subpoenas for the members of the Commission. This was that discussion:

"Hearing Examiner Ewell: Well, no that wasn't quite what I had in mind. I said that after the testimony is all in on both sides, I wanted to know if you had any motions that you intended to make which would require a good deal of argument possibly, and study, before they could be disposed of.

Mr. Johnson: Let me clear up one point. Occasionally, Mr. Kennamer is helpful and surprisingly, I think on this occasion, he has raised a point that probably I should have cleared up in answer to your question. *This will depend to a considerable extent upon the nature of Mr. Pennekamp's testimony and the manner in which it is concluded, but there is a very serious possibility unless he changes or there is some change in his position it will be my intention to request subpoenas for members of the Exchange Commission. However, that is a matter I am going to have to appraise, as I go along.*

Mr. Kennamer: Well, I am glad that I have been helpful in this context, and I assume that counsel for the Exchange is now saying that he may or may not ask the Hearing Officer to issue subpoenas directed to the individual members of the Security and Exchange Commission." (Tr., p. 2105, l. 17 to p. 2106, l. 11.)

Upon further inquiry being made along the same line by the Commission's counsel, the position of the Mining Exchange was repeated:

"Mr. Kennamer: No, sir, but does that exhaust the number of witnesses who are to be called in concluding the case for the Mining Exchange?

Mr. Johnson: With the one exception that I noted previously in which *I said I would have to make the determination during Mr. Pennekamp's examination. I think that will not take too long, and we will let you know right away.*

Mr. Kennamer: Well, now, Mr. Examiner in the event that Mr. Pennekamp's testimony is not to the satisfaction of counsel for the Mining Exchange, I ask him now to identify the additional witnesses whose testimony might be needed.

Mr. Johnson: *I think I did, the members of the Commission, and possibly Mr. Du Bois. That would be it.*

Mr. Kennamer: In other words, you are now saying, sir, that *you may or may not request the attendance of the five members of the Securities and Exchange Commission, and the secretary of the Commission?*

Mr. Johnson: *That is correct. That is what I said before.*" (Tr., p. 2159, l. 15 to p. 2160, l. 8).

C. Counsel for Petitioner Made a Formal Demand for the Production of the Documents—It Was Held That They Were Confidential.

Upon Mr. Pennekamp's return as a witness he was asked to produce the correspondence that counsel for the Mining Exchange considered to be pertinent to his inquiry concerning possible bias or prejudice on the part of one or more Commission members. This was the question propounded:

“By Mr. Johnson:

Q. Mr. Pennekamp, will you produce, please, any correspondence in your files, either letters emanating from you, or your staff members in this regional office, or letters addressed to the members of the Commission, or the Securities and Exchange Commission, Mr. Orval Du Bois, or Mr. Philip A. Loomis, Jr., director of the Division of Trading and Exchanges, or any other member of the staff of the Securities and Exchange Commission in Washington, or any letters addressed to you or to members of your staff by members of the Commission, or by Mr. Orval Du Bois, the secretary of the Commission, or Mr. Philip A. Loomis, Jr., or Mr. Irving M. Pollack, associate director of the Division of Trading and Exchanges, or by any other members of the Commission's staff in Washington addressed to your office, or to any member of your staff during the following period: From March 27, 1962 to June 12, 1962, with relation to any of the following subjects, and with your permission, Mr. Hearing Officer, I am going to state them all so as to avoid having to ask repetitious questions on the proof that I have already referred to:

Communications on the following subjects: The transmittal of the statements made by Archie H. Chevrier on March the 27th and April the 11th.

The transmission of correspondence concerning the initiation of a comprehensive report and conduct of a comprehensive report with respect to the San Francisco Mining Exchange, any correspondence indicating or referring to the people, the members of the staff who prepared that report.

Any correspondence transmitting or referring to the transmission of documentary evidence or statements which were used in the preparation of that report.

Any correspondence relative to action taken by the Commission directing or suggesting revisions of the original draft of the report and indicating the extent to which it was revised and the nature of those revisions.

The next subject: Any correspondence relative to the question of offers on the part of the San Francisco Mining Exchange, its members, officers, or their legal counsel, to submit a plan of revision of their procedures between July 16, 1962, and September 4th, 1962; generally, any correspondence between March 27th and July 26th, 1962, relative to the initiation and filing of charges or an order for proceedings against the San Francisco Mining Exchange.

I would ask the production of those records." (Tr., p. 2187, l. 4 to p. 2188, l. 21).

After extensive argument, this was the disposition of the question:

"Mr. Kennamer: *The Division will not submit those communications, Mr. Examiner, and I move that his question be stricken.*

Hearing Examiner Ewell: Well, I will deny the motion. *I have already ruled that they were confidential, so I don't see any further discussion needed now.*" (Tr., p. 2193, ll. 17-21).

Mr. Pennekamp's testimony thereupon ended with this exchange:

"Mr. Johnson: I have nothing more of Mr. Pennekamp at this time.

Mr. Kennamer: Mr. Examiner, *I would like to inquire whether, now that Mr. Pennekamp has completed his testimony, counsel for the Mining Exchange intends to subpoena the individual members of the Securities and Exchange Commission.*

Mr. Johnson: *Yes, he does.*

Mr. Kennamer: Well, when is that application to be made, if it is to be made, Mr. Examiner?

Mr. Johnson: I think I will make that with your permission on Monday.

Hearing Examiner Ewell: All right." (Tr., p. 2194, l. 23 to p. 2195, l. 9).

D. Counsel for Petitioner Presented Written Requests for a Subpoena Duces Tecum and Subpoenas Ad Testificandum and Explored the Possibility of Their Issuance With the Hearing Examiner.

As promised, on Monday, February 11, 1963, counsel for the Mining Exchange presented to Hearing Examiner Ewell two written applications for the issuance of subpoenas. They were in the following form:

(1) Affidavit and Application for Issuance of Subpoena Duces Tecum. (This requested only the issuance of a Subpoena Duces Tecum to Orval L. Du Bois, Secretary of the Commission); and

(2) Application for Issuance of Subpoena. (This requested the issuance of subpoenas ad testificandum directed to the five members of the Commission).

Upon the presentation of the written applications by counsel for the Mining Exchange the following colloquy took place:

“Mr. Kennamer: Mr. Examiner, before we recess I would like to point out that under no circumstances can filing of these applications be considered as timely or suitable in these circumstances.” (Tr., p. 2287, ll. 17-19).

“Hearing Examiner Ewell: I have given some thought to the matter, and while I agree that timeliness is a matter to be considered, *I think, as every lawyer knows, the facets of a lawsuit change from hour to hour. I don't think there is any precise limitation upon the moment of time at which a subpoena or the desirability of certain testimony or evidence might be deemed essential in the opinion of the counsel for the protection of his client, whoever he may be.*

So far as the subpoena duces tecum is concerned the rules require a showing of general relevance, which, of course, raises an issue that would require some sort of disposition prior to the issuance of the subpoena.

So far as the issuance of the subpoena ad testificandum is concerned, there is no special requirement other than an application, as far as that goes. However, I have some ideas on the subject that I intend to submit to the parties in due course. I would not want to do it until I had at least read the application for the subpoena duces tecum.” (Tr., p. 2288, l. 18 to p. 2289, l. 10).

The position of the Mining Exchange counsel as to the procedure he was following was explained at page 2294, line 8 to page 2295, line 25, as follows:

“Mr. Johnson: *Subsection 1, it seems to me, does not require a written application.*

Hearing Examiner Ewell: *That is correct.*

Mr. Johnson: However, I put it in writing also because I was getting out the other one.

The wording of the section is, beginning with Section 1, ‘Any member of the Commission, the Hearing Officer or any other officer designated by the Commission for the purpose, in connection with any hearing ordered by the Commission, Paragraph (i) shall issue subpoenas requiring the attendance and testimony of witnesses at any designated place of hearing, upon application therefor by any party.’

“Now, *in addition to the fact that a written application is not required, that subsection seems to say that upon an application being filed, a subpoena shall be issued; mandatory.* There is no requirement in that section or any statement or amplification in any sense.

Hearing Examiner Ewell: *Well, I think that is correct.”*

The Hearing Examiner stated clearly his understanding of the proper interpretation of the then controlling rule for the issuance of subpoenas ad testificandum:

“Mr. Kennamer: What has not been answered, Mr. Examiner, is the basis and fundamental inquiry, just what, if anything, does counsel for the Mining Exchange expect to prove from the testimony from all or any one of the five members of the Securities and Exchange Commission?

Hearing Examiner Ewell: *I don't think under the rules he is required—*

Mr. Johnson: That is my viewpoint.

Hearing Examiner Ewell: *It is mandatory without any qualification.”* (Tr., p. 2296, l. 25 to p. 2297, l. 9).

The legal situation as to the right of the Mining Exchange to obtain and present evidence of bias and prejudice on the part of members of the Commission was explored in the following discussion between Hearing Examiner Ewell and counsel for the Mining Exchange:

“Hearing Examiner Ewell: Do you have any reply to that, Mr. Johnson? I would like to have your expression of your position as to my suggested disposition.

Mr. Johnson: May I explore it with you a little bit?

Hearing Examiner Ewell: Yes, sir.

Mr. Johnson: I want to make sure that I understand it. If I understood your reading of the pertinent portions of the Federal Home Loan Bank case, the court in that matter, in effect, held two things: No. 1, they held that official responsibility or duty can't be shrugged off or divested by reason of the fact that even though they might be proved to be biased—in other words, it is incapable—the incumbent holders of memberships on Boards collectively are unable to divest themselves of the duty to proceed with a hearing—

Hearing Examiner Ewell: Yes, sir; apparently it says that the charges of bias and prejudice must give way to the necessity of permitting the same to perform its duty.

Mr. Johnson: In other words, for practical purposes, public business can't be held up. Even though you prove that all the members of a public board are biased and prejudiced, they must go ahead and conduct the hearing.

While that decision held that public business must proceed, it also held, and actually quite independently, that bias and prejudice and evidence of it is relevant

and that the Commission itself might consider whether or not one or more members of its body are biased and prejudiced.

Hearing Examiner Ewell: *I took that to mean that you could have introduced evidence in your case in chief, if you had it, that such a situation existed.*

Mr. Johnson: Well, that would permit us, *that would certainly give us a right to apply for subpoenas to prove that. We have applied for subpoenas.* I am not talking about for the moment about our subpoenas duces tecum. I am talking merely about the general one. We have applied for subpoenas, so even if we concede what Mr. Kennamer has been saying, namely that the only purpose is to explore into the question of bias and prejudice, then under that case we are entitled to the subpoena.

“Hearing Examiner Ewell: *Yes, I think you might have a prima facie right to it.*” (Tr., p. 2303, l. 1 to p. 2304, l. 15).

Ultimately the procedure for deciding the issue in a deliberative manner was agreed upon in this way:

“Mr. Johnson: On that point, Mr. Hearing Officer, I am going to accede to your suggestion because in this matter, which I consider to be important, I am not going to put my client, or myself, in a position of trying to force a ruling in five or ten minutes on important issues such as this, and I think in fairness to you and everybody involved, you are entitled to time to research and think it over and come to whatever conclusion you will. Whatever you decide, we will comply with.

Hearing Examiner Ewell: *So then you would have no objection to my deferring the issuance of the subpoena or making disposition of this question until after I return to Washington?*

Mr. Johnson: *I certainly would not.*

Mr. Kennamer: And I assume, Mr. Examiner, there would be no objection to either the Mining Exchange or the Division addressing briefs to the Hearing Officer on the question as to whether the subpoena should be issued under the circumstances.

I might suggest that the Hearing Officer set a date within which such briefs might be received.

Hearing Examiner Ewell: That would seem to be appropriate, yes, sir.

How about ten days?

Mr. Kennamer: That's agreeable with the Division.

Mr. Johnson: That's all right with me, Mr. Hearing Officer. *I can tell you my brief will be the rule and the case you read from.*" (Tr. p. 2310, l. 3 to p. 2311, l. 5).

III. THE HEARING OFFICER DENIED THE APPLICATION FOR A SUBPOENA DUCES TECUM, BUT GRANTED THE APPLICATION FOR SUBPOENAS DIRECTED TO THE MEMBERS OF THE COMMISSION! THE COMMISSION REVERSED THE ORDER DIRECTING THE ISSUANCE OF SUBPOENAS TO ITS OWN MEMBERS.

A. The Application for a Subpoena Duces Tecum Directed to the Secretary Was Denied.

On March 15, 1963 the Hearing Examiner issued a lengthy "Memorandum and Order on Application for Issuance of Subpoenas" in which:

1. "It is Ordered that the application for issuance of a subpoena *duces tecum* directed to Orval L. Du Bois, Secretary of the Commission, for production of the material set forth therein be, and the same hereby is, DENIED." and

2. "Deferment of a ruling on the application for issuance of the subpoena *ad testificandum* until after the within ruling on the subpoena *duces tecum* had become final upon review would not be prejudicial to the parties."

The Mining Exchange excepted to the first ruling and applied for its certification to the Commission. On April 2, 1963 the Hearing Examiner certified the exceptions for review. On July 31, 1963 the Commission issued its "Memorandum Opinion and Order" which concluded with this direction:

"Accordingly, It is Ordered that the ruling of the hearing examiner refusing to issue a subpoena *duces tecum* requested by the Exchange in this proceeding be, and it hereby is, affirmed."

A rehearing was requested, but it was denied on September 9, 1963.

B. The Application for Subpoenas Ad Testificandum Directed to the Members of the Commission Is Granted.

On September 10, 1963 Hearing Examiner James G. Ewell issued his "Ruling and Order On Application for Certain Subpoenas Ad Testificandum." The effective part of the order was the direction that the application:

"is hereby *GRANTED*."

The Hearing Examiner, having considered thoroughly the positions stated by the parties, came to this conclusion:

"Now, therefore, upon consideration of the foregoing, the briefs heretofore submitted and the principles set forth in the memorandum and order of the undersigned dated March 15, 1963, aforesaid, indi-

eating that, under the provisions of Rule 14(b)(1)(i) of the Commission's Rules of Practice, *issuance of subpoenas ad testificandum under application of any party is mandatory, the pending application for issuance of subpoenas directed to each member of the Commission and to its Secretary to appear and testify in this proceeding at the instance of counsel for the respondent, is hereby GRANTED; said subpoenas to be made returnable at such time and place as may hereafter be agreed upon by the parties, and*

It is so ORDERED."

The result was that the petitioner herein, the Mining Exchange, was then entitled to subpoenas directing the five members of the Commission to appear and be examined. Hearing Examiner Ewell's letter of transmittal stated that he had left open for further discussion the time and place for the resumption of the taking of testimony.

C. The Commission Reversed the Order for the Issuance of Subpoenas Directed to Its Own Members.

As might have been expected, the Division of Trading and Exchanges was not satisfied with the Hearing Examiner's order. The Division took exception to the ruling and order on September 13th, and requested that the question be certified to the Commission for review. The Hearing Examiner certified the question on September 25th.

More than five months later, on February 26, 1964, the Commission finally issued its "Memorandum Opinion and Order" stating:

"It is Ordered that the ruling of the hearing examiner granting the request of the Exchange for issuance of subpoenas ad testificandum be *reversed*, and that *such subpoenas not be issued.*"

IV. REASONABLE GROUNDS EXISTED FOR INQUIRING INTO THE POSSIBLE BIAS OR PREJUDICE OF ONE OR MORE MEMBERS OF THE COMMISSION. APPLICABLE LEGAL AUTHORITIES HOLD THAT PETITIONER WAS ENTITLED TO THE ISSUANCE OF SUBPOENAS SO AS TO AFFORD IT AN EVIDENTIARY HEARING ON THE ISSUE OF BIAS AND PREJUDICE.

A. **Several Grounds Existed That Supported the Belief That Some Members of the Commission Were Not Objective in Their Consideration of the Proceeding.**

The administrative record developed a number of specific facts suggestive of the possibility that one or more of the Commission members had not maintained that objectivity that conforms to the traditional view of an impartial and disinterested tribunal.

In the first place, the Loomis letter of June 28, 1962 was replete with references to:

"the Commission has authorized us to proceed;"

"revised in accordance with the Commission's directions;"

"staff recommendations have been considered by the Commission . . . ;"

"the Commission will order such withdrawal;"

"the Commission does not plan;"

"the Commission does not wish;"

"the Commission does not plan to make the report public;"

"the Commission will not hereafter make the report . . . public."

Secondly, more compelling, and cumulatively suggestive of a lack of objectivity and impartiality, was the generally known fact that two of the five members of the Commis-

sion had served for almost twenty years each in various capacities as members of the SEC staff. Their records of SEC staff services are recorded in the following biographies from "Who's Who in America" (Vol. 34, 1966-67):

Cohen, Manuel Frederick: govt. ofcl.; b. Bklyn., Oct. 9, 1912; s. Edward and Lena (Katzmar); C.; B.S. in Social Sci., Bklyn. Coll. 1933; LL.B. cum laude St. Lawrence U., 1936; m. Pauline Grossman, Apr. 20, 1940; children—Susan D., Jonathan W. Research asso. 20th Century Fund, 1933-34; admitted to N.Y. bar, 1937; pvt. practice, N.Y.C. 1937-42; *with SEC, 1942—, chief counsel div. corp. finance, 1952-59, adviser to comm., 1959-60, dir. div. corp. finance, 1960-61, commissioner, 1961—, chairman and secretary, since 1964—*. Lecturer in law George Washington U. Law School, 1958—; mem. council Adminstrv. Conf. U.S., 1961—. Recipient Rockefeller Pub. Service award, 1956, Nat. Civil Service League Career Service award, 1961. Mem. Am. Fed. bar assns., Am. Soc. Internat. Law, Author articles prof. Jours Home; 6403 Marjory Lane, Bethesda 14, Md. Office: Securities and Exchange Comm. 425 2d St. N.W., Washington 25.

Woodside, Byron Darlington: govt. ofcl.; b. Oxford, Pa., Aug. 28, 1908; s. Crosby J. and Bertha Taylor (Frame) W.; B.S.; U. Pa., 1929; A.M., George Washington U., 1933, grad. study, 1937-42; LL.B., Temple U., 1946; m. Georgette Frances Ingram, Jan. 30, 1932; children—Byron C., Billie (Mrs. John C. Patterson), Georgette Marilyn, Admitted to D.C. bar, 1950; *asst. dir. div. corp. finance SEC, 1940-48, 49-50, asso. dir., 1952, dir. div. corp. finance, 1952-60, mem. SEC, 1960—*; dir. bus. expansion office NSRB, 1950-51; dir. div. def. expansion, Office Resources Expansion,

DPA, 1951. Mem. deconcentration review bd. G.H.Q., SCAP. U.S. Army, Tokyo, Japan, 1948-49. Mem. Phi Delta Phi. Home: Haymarket, Va. Office: 425 2d St. N.W., Washington 25.

Many of the facts referred to in the charges as constituting violations occurred during the years when Messrs. Cohen and Woodside were active members of the staff, and prior to their respective appointments to membership on the Commission.

B. Counsel for Petitioner Followed the Course of Attempting to Make Inquiry Before Filing Charges of Bias and Prejudice.

Knowing of these specific facts suggesting the possibility of non-objectivity on the part of one or more Commission members, and being aware that the disqualification of regulatory agency members has become increasingly frequent in the administrative process, counsel for the Mining Exchange was justified in taking steps to protect his client against a biased commission whose members, or some of them, had prejudged the issue, and who would consider the record with closed minds.*

*See 25 *Fed. Bar Journal* 273, Paul Rand Dixon, chairman Federal Trade Commission: "Disqualification of Regulatory Agency Members: The New Challenge to the Administrative Process". Pertinent is this portion of the Introduction:

"A major problem now seems to be developing, however, around that vital phrase 'informed by experience.' The question is being raised as to whether agency members can be so well 'informed by experience' that *their minds are already closed before particular cases reach them for adjudication—whether they have, in short, 'decided in advance' the issues involved and are, therefore, 'disqualified' to hear and adjudicate those matters. In recent weeks the agencies and the courts have been presented with a rash of 'bias' cases.*"

Counsel followed the cautious, responsible course of making inquiry first, rather than hurling loose charges of bias and prejudice. He made clear the purpose of his inquiry upon cross-examination of Regional Administrator Pennekamp (Tr. pp. 1535-7) during the presentation of the Division's case (before the Mining Exchange had an opportunity to undertake its own affirmative presentation).

When objections to this line of inquiry were sustained, and Mr. Pennekamp was allowed to leave the witness stand without either producing the documents that were requested or answering the questions that were propounded, counsel for the Mining Exchange stated that, if the necessary evidence was not forthcoming from Mr. Pennekamp, he would probably request subpoenas for the members of the Commission and their Secretary (Du Bois). This statement was made at several points in the record (Tr., pp. 2105-6; pp. 2159-60).

As soon as Mr. Pennekamp's testimony was completed during the presentation on the part of the Mining Exchange, its counsel stated positively that he would present applications for subpoenas for members of the Commission at the next session. That was done.

As is clearly evident from a reading of the excerpts from the transcript that are pertinent to this issue, it was the theory of counsel for the Mining Exchange that the rules and the reported decisions pointed out that the approved course of action is to raise the question of bias and prejudice during the administrative hearing, make known the purpose of the inquiry, then request sub-

poenas if necessary, and request an evidentiary hearing upon the issue of bias and prejudice as part of the administrative process.

On the contrary, counsel for the Division adamantly maintained that:

“... The only avenue that I can suggest that might be available adjudication of this problem is a collateral suit against the members of the commission in the courts.” (Tr., p. 1546)

C. The Effect of the Commission's Order Reversing the Hearing Examiner's Direction That Subpoenas Ad Testificandum Be Issued Was to Deny Petitioner Due Process of Law.

The effect of the Commission's order reversing the Hearing Examiner's Ruling and Order *granting* the application for the issuance of subpoenas *ad testificandum* was to deprive the Mining Exchange of the requested evidentiary hearing on the issue of bias and prejudice on the part of one or more of the Commissioners.

The San Francisco Mining Exchange, petitioner herein, has consistently asserted that this ruling deprived it of a fair and full hearing and constituted a denial of due process of law.

D. The Commission's Own Footnote 19 to Its "Findings and Opinion" Is Clear Evidence of Its Apprehension That It Has Denied Petitioner Due Process of Law.

So strong is the record in support of petitioner's charge of a denial of due process of law that the Commission itself was unable to refrain from the expression of a note of apprehension in an entirely defensive, although indefensible, footnote to its "Findings and Opinion of the Commission" dated April 22, 1966. Having concluded

that it would withdraw the registration of the Mining Exchange, it wound up its Opinion with this sentence:

“The withdrawal of its registration is, if anything, long overdue.¹⁹”

The Commission could not resist adding that footnote 19. It is a self-exculpatory, entire defensive restatement of its pretext for denying a full evidentiary hearing on the sensitive issue of the bias and prejudice of one or more of its own members. This is the full footnote 19:

“The Exchange in its brief in support of the hearing examiner’s recommended decision states that if his recommendation is not approved by us, its position is that *it has been denied a full and fair hearing because of our refusal to authorize the issuance of subpoenas directed to the members of this Commission and our Secretary* and for the production of non-public Commission files, all allegedly for the purpose of inquiring into whether this Commission was biased or had prejudged the issues against the Exchange. We have already considered and rejected these contentions of the Exchange on three prior occasions. Securities Exchange Act Release No. 7106 (July 31, 1963); Securities Exchange Act Release No. 7247 (February 26, 1964). We see no reason to change our conclusions in this respect and for all the reasons stated in our prior rulings we affirm them. Nothing has been presented to indicate that the Exchange has not had a fair hearing. In fact, as we previously noted (Securities Exchange Act Release No. 7106, p. 2) in view of the nature of these proceedings we authorized the Division to take the unusual step of furnishing the Exchange a copy of the Division’s investigation report prior to the institution of these proceedings. Our decision herein

is based solely on the facts in this record, many of which have been admitted by the Exchange and most of which are uncontroverted."

E. The Controlling Legal Authorities Support Petitioner's Contention That It Was Entitled to the Issuance of Subpoenas so as to Afford It an Evidentiary Hearing on the Issue of Bias and Prejudice.

The obvious apprehension and anxiety of the Commission as it is made apparent in footnote 19 to the "Findings and Opinion of the Commission" is easily understood when one turns to the reported decisions on the subject of the disqualification of regulatory agency members for bias and prejudice—especially decisions involving the present chairman of the Securities and Exchange Commission, Manuel F. Cohen, one of those whom counsel for the Mining Exchange sought to subpoena and question.

One of the early landmark decisions was rendered in the Third Circuit in 1941 in the case of *Berkshire Employees Association v. National Labor Relations Board*, 121 Fed. 2d 235, 238-9, in which Judge Goodrich wrote the opinion including this historic statement of the essential elements of fair play in the functioning of an administrative tribunal:

"... If the administration of public affairs by administrative tribunals is to find its place within the present framework of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by

an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision. The Judicial process, or any other human process, cannot operate in a vacuum. The most we can hope for is that persons charged with the responsibility for decisions affecting other people's lives and property will be as objective as humanly possible. Certain rules, of more or less definiteness, have been worked out through judicial decision by judges to regulate their own conduct.

* * *

“We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant. If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side. This is obviously not like a case where ill-advised extrajudicial statements have been made by a judge, or where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind. It goes further and, in our judgment, it goes beyond that which is permissible from the standpoint of either litigants or public.

“The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way

which we know of whereby the influence of one upon the others can be quantitatively measured.”

That classic delineation of administrative objectivity has been repeated approvingly time and again, including a case involving both the Securities and Exchange Commission and the conduct of the present chairman and long-time staff member, Manuel F. Cohen (one of the members that petitioner in this proceeding sought to subpoena and examine).

In that case, *Amos Treat & Co. v. Securities and Exchange Commission* (1962) 306 Fed. 2d 260, 263, Justice Danaher of the District of Columbia Circuit wrote the opinion. As he pointed out, the appellant Treat had filed a motion that “an evidentiary hearing be held to determine whether any members of the Commission were disqualified with respect to past or future proceedings and the facts relating to the ex parte representations, so as to enable the Commission to then determine whether to grant a discontinuance.”

The Commission denied the motion to adduce further evidence on the facts. In the *Treat* case, as in the instance of footnote 19 in this proceeding, the Commission’s state of apprehension was evident, and:

“Appended to the Commission’s April 11, 1962 ‘minute’ order was a written statement prepared by Commissioner Cohen outlining his recollection and conclusions with respect to the various proceedings which had been conducted while he was the director of the Division of Corporation Finance and stating the extent to which he had participated in the actions taken by the Commission.” (At p. 263)

The Court of Appeals for the District was unimpressed by Commissioner Cohen's ex parte effort at self-exculpation. In ruling it said:

"Appellants alleged that participation by Commissioner Cohen had rendered the proceedings void and so irrevocably tainted that any final determination which might flow from such proceedings will be invalid. It is our view that a substantial showing has been made.

Just exactly how the concept of 'due process' is to be applied will vary with the type of proceeding involved, as we are well aware.

'Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.'

"At the very least, quasi-judicial proceedings entail a fair trial. As the Supreme Court has said in other context:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

* * * *

'It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. * * * Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or ac-

quittal of those accused. * * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.''' (at p. 263)

The same general reasoning prevailed in the decision rendered by this Court in *Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association* (1961) 295 F. 2d 403. This was the case studied by Hearing Examiner Ewell when petitioner presented its applications for subpoenas, and it was the subject of the exploratory colloquy between the Hearing Examiner and counsel for the Mining Exchange (Tr., pp. 2299-2304), during which counsel outlined his understanding of the approved procedure for obtaining an evidentiary hearing upon a prospective claim of bias and prejudice.

The following portions of the *Federal Home Loan Bank* case seem pertinent to this proceeding and actually are controlling on the issue here presented (at pp. 408-409):

“In our opinion, however, a majority of the Board members were without power to disqualify themselves for bias or prejudice, although possibly an individual member comprising a minority of the Board could have done so. The charge of bias and prejudice directed against the majority of the members of a government agency must give way to the necessity of permitting the agency to perform the function which it alone is empowered to perform.

It follows that no action the Board could have taken on the Association's challenge as to the qualifications of its members could have resulted in the invalidation of previous Board orders and thus undermined the legality of the subpoenas. Nor could any

such action have disabled the Board, or a majority thereof, from performing its statutory duties at all future stages of the proceeding. Hence the district court should not have directed the Board to act on the challenges nor should it have stayed action on the enforcement petition pending such a Board determination.

But while the charges of bias and prejudice on the part of the Board and its members could not operate to undermine the authority under which the Board issued the subpoenas, evidence of bias and prejudice the Association thereby sought to produce was not irrelevant. In connection with the presentation of the Association's case-in-chief, as the examiner properly ruled, the Board should receive evidence of bias and prejudice on the part of its members. Such evidence would be relevant because the Board could determine for itself whether if the facts are established, a minority member is disqualified from participation in the final decision. Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B. 3 Cir., 121 F. 2d 235, 239. Evidence of bias or prejudice on the part of Board members would also be relevant for consideration by a court called upon to review a final Board order. See Marquette Cement Mfg. Co. v. F.T.C., supra note 9, 147 F. 2d at page 594."

In that case, the appellant association, during the administrative hearing, had applied to the examiner for subpoenas addressed to the members of the Board and other persons. The Examiner issued the subpoenas as requested. The members of the Board filed a motion to quash them, which was denied.

The reported decisions support the conclusion of Hearing Examiner Ewell that petitioner was entitled to an evidentiary hearing to explore the possibility of bias and prejudice on the part of one or more of the members of the Commission, and that subpoenas ad testificandum should have been issued.

The Commission's "Memorandum Opinion and Order" of February 26, 1964 reversing the Hearing Examiner and directing that "such subpoenas not be issued" was contrary to law, denied to petitioner a fair and full hearing, and was a denial of due process of law.

F. The Commission's Attempt to Wrap the Cloak of Confidentiality Around Documents Pertinent to a Litigated Controversy Is Contrary to the Prevailing Federal Rule.

Petitioner's "Affidavit and Application for Issuance of Subpoena Duces Tecum" directed to the secretary of the Commission (Du Bois) was denied by the Hearing Examiner in his "Memorandum and Order on Application for Issuance of Subpoenas" dated March 15, 1963 with the conclusion that:

"* * * All of such material is deemed to come squarely within the meaning of the Commission's rule announcing *the confidentiality* of such material and prohibiting its disclosure without the Commission's approval—even by persons under subpoena. The applicable provision on this point is set forth in Rule 26(c) of the Commission's Rule of Practice." (at p. 12)

In support of its "Affidavit and Application for Subpoena Duces Tecum" petitioner filed with the Hearing Examiner a Brief citing two leading authorities from the

Federal Courts setting forth masterly statements of the modern rule frowning upon government efforts to set up, by rule or otherwise, the protective screen of "confidentiality" around pertinent documents, and thereby seek to suppress them.

We referred to the opinion by Justice Learned Hand in *U. S. v. Andolschek* (1944) 142 F. 2d 503, 506, where he said (in a criminal case):

"While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

To the same effect was the opinion of Mr. Justice Brennan in the famous case of *Jencks v. United States* (1957) 353 U.S. 657:

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Rori-*

aro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 627-628, 1 L.Ed.2d 639. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

While the *Jencks* case was criminal in nature, the *Jencks* doctrine has been recognized as applying to the administrative process. This was enunciated in *Great Lakes Airlines v. C.A.B.*, 291 F. 2d 354-362, as follows:

"* * * The underlying principle of the *Jencks* case is generally applicable in administrative proceedings and has been judicially recognized."

Hearing Examiner Ewell conceded of the *Jencks* case, that:

"It is clear, also, that the principle therein announced would tend to reach documents of virtually every kind, in the hands of government officials
* * *."

He felt, though, that until the Commission had taken action and such action has been "made known the undersigned considers the Rule—(26c)—to be binding upon the Hearing Examiner at all times during the conduct of a proceeding in which he has been designated to function."

Certainly the United States Court of Appeals is under no such compulsion. It should recognize that the salutary rules of the *Jencks* case should apply to the Securities and Exchange Commission equally as to a criminal case.

V. **THE CONCLUSION AND REMEDY RECOMMENDED BY THE HEARING EXAMINER ARE SUPPORTED BY THE RECORD OF THE PROCEEDINGS AND THE RECORD OF PERFORMANCE BY THE MINING EXCHANGE—THE ORDER OF THE COMMISSION SHOULD BE SET ASIDE.**

A. **The Hearing Examiner's Conclusion Was Based on a Careful Consideration of Uncontradicted Testimony.**

Hearing Examiner James G. Ewell reviewed carefully the entire transcript of the proceedings and then set forth in his "Recommended Decision" a detailed series of Findings of Fact numbered from 1 to 118.

The Hearing Examiner took a severe attitude concerning the omissions, as well as both the misfeasance and malfeasance of the members of the Mining Exchange. He made findings in accordance with the stipulations, the exhibits and the oral testimony.

Having completed his findings, he then proceeded to weigh the evidence—all of it—in determining the appropriate remedy. Considering the entire record, which he had heard and read personally, he reached the conclusion set forth at page 106 of the "Recommended Decision", which was:

"The undersigned therefore concludes, in exercise of what is believed to be due moderation, that the public interest (indeed, as here attempted to be expressed by responsible persons of high office and by recognized professional and civic bodies) might well be served if the present officials of the Mining Exchange were afforded a further but final opportunity under the guidance of their counsel, to reorganize the Mining Exchange in all of its functional aspects so as to present entirely new personnel in every department of management without exception."

In reaching his conclusion and determining upon the nature of the remedy, the Hearing Examiner was impelled to accept the uncontradicted and unchallenged testimony of independent, impartial witnesses produced by the Mining Exchange, whose only purpose and motive was a desire to serve the public welfare and to speak and act in the public interest.

He made this clear in the preliminary portions of his "Conclusions and Recommendations," when he said (at pp. 104-105):

"In sum, the evidence on behalf of respondent in the form of opinions of public bodies and officials although, as already pointed out, susceptible of weakness inherent in all hearsay testimony, nevertheless is regarded by the Examiner as worthy of consideration—inasmuch as there is no evidence of demonstrable self-interest or any motive other than a desire, on the part of the givers of the testimony, to serve the public welfare.

"* * * It would seem to follow that the opinions of the public bodies and officials placed upon the record here are entitled to be considered substantial evidence at least of the *reputation* of the Mining Exchange as having rendered valuable service to the Mining industry in the community in which it has operated for more than 100 years."

The evidence from public officials and public bodies referred to in the Hearing Examiner's "Conclusion and Recommendations" was summarized and accepted by him in his Findings 115-118 (pages 97-104 of the "Recommended Decision.")

This evidence presented by the Mining Exchange was not contradicted or challenged in any way by the prosecuting Division of Trading and Exchanges. Its counsel contented himself with scoffing at it as "totally lacking in evidentiary value." (Tr., pp. 2256, 2266)

B. Responsible Public Officials and Recognized Professional and Civic Bodies Urged That the Mining Exchange Be Allowed a further Opportunity to Reorganize.

One of the most impressive witnesses was Philip R. Bradley, a mining engineer, who had served for 19 years as Chairman of the State Mining Board. He presented and read into the record an official resolution adopted by the California State Mining Board on December 12, 1962. It read as follows:

"San Francisco Mining Exchange: Discussed effects of closing the Exchange, as is being contemplated by the Securities and Exchange Commission. The Board authorized the following resolution: Resolved, that the State Mining Board recognizes the need and value of a Stock Exchange such as the San Francisco Mining Exchange, and is in sympathy with the furtherance of such an Exchange, provided that it operates within the regulations of the Security (sic) Exchange Commission, and that any irregularities within the Exchange be corrected."

(See Finding 116, p. 99 of Recommended Decision for testimony of Philip R. Bradley, see Tr., pp. 1666-1677.)

Equally strong was a resolution read into the record by G. Louis Fox, Executive Vice President of the San Francisco Chamber of Commerce. This resolution had

been adopted by the Chamber's Board of Directors upon the recommendation of its Mining Committee. The resolution stated, in part:

"On recommendation of the Mining Committee of the San Francisco Chamber of Commerce, the Chamber's Executive Committee strongly supports retention of the San Francisco Mining Exchange as an institution which has rendered, and should continue to provide, essential services in the development of the mineral resources of the State of California and the West by making possible the financing of small mining enterprises. . . .

"The Mining Committee believes that the *San Francisco Mining Exchange has rendered and should continue to render essential services by making possible the financing of small mining enterprises whose stocks do not qualify for trading on the regular Stock Exchange*. It seems unnecessary to point out that virtually all the large producing mining enterprises of the nation have sprung from ventures that were initially very small.

"In the event of the closing of the Mining Exchange it might be possible for small companies to market securities elsewhere, but it is suggested that in the marketing of the stocks through other channels protection of the investing public will be lessened, in contrast to the SEC's aim of increasing this protection. To count on the distribution of the stocks of member companies through other channels or through mining exchanges in cities distant from the headquarters of these firms would interfere, probably fatally, with the distribution of the securities of the small enterprises involved." (Tr., pp. 1539, 1560-61)

Strong statements were presented in the form of letters from George Christopher, then the Mayor of San Francisco (set out in full in Finding 117) and from the then Congressman Jack Shelley, now the Mayor of San Francisco (Finding 118).

The Governor of the State of Nevada, Honorable Grant Sawyer, submitted an unusually strong statement pointing out the unique contributions of the Mining Exchange to the mining industry of the entire West. In part, Governor Sawyer said this:

“Because of the importance of this Exchange to the already depressed mining industry in Nevada and because of the reliance of many small mining enterprises in this state on the services of the Exchange, I am writing to request that further consideration be given before making your final decision.

“The San Francisco Mining Exchange has been in operation for almost one hundred years, and in its history, has made a unique contribution to the development of the western mining industry.

“The existence of an exchange close to Nevada which can provide marketing services is of great importance * * *. The San Francisco Mining Exchange, both because of its geographical location and its specialized services, is an important aspect of Nevada and western mining.” (Finding 117; Tr., pp. 2266-69)

Similar statements came from the outstanding public service bodies of the mining industry: the American Mining Congress and the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. (Finding 118; Tr., pp. 2268-2274).

- C. The Commission's Order Is Based Upon False Premises Not Supported by the Record.**
- 1. The Commission Did Not Charge or Prove That Any Member of the Public Suffered Monetary Loss.**

The Commission, in its "Findings and Opinion of the Commission", disposed of the uncontradicted and unchallenged evidence by the responsible public officials and public bodies with a single paragraph (at p. 11):

"We have given consideration to the views expressed by several public officials and civic and business associations that the present Exchange has served a useful purpose and that it or one like it should be allowed to exist. We recognize that an area exchange, whether or not it is limited to trading in securities of mining concerns, may serve a valuable function, but we think we would not fulfill our duty to act for the protection of investors if we did not withdraw the registration of this Exchange, which as the hearing examiner found, has a history of 'pervasive and abysmal abdication of responsibility' and which because of its 'aura of legitimacy' as a quasi-public institution has been used as 'an unsuspected tool for manipulative practices perpetrated by its members and principal officers for their own personal and unconscionable gain.' The withdrawal of its registration is, if anything, long overdue."

It will be seen at once that the Commission's conclusion is based upon the premise that the Mining Exchange "has been used as 'an unsuspected tool for manipulative practices perpetrated by its members and principal officers for their own personal and unconscionable gain.'"

The fact is that the prosecuting Division did not charge or prove that any member of the public suffered mone-

tary loss by reason of any of the alleged violations. This was conceded by the Hearing Examiner, who specifically found that:

“* * * It must be acknowledged that no evidence was introduced in this proceeding of specific losses sustained by the public.” (at p. 106 of the “Recommended Decision”)

This failure of the Division to charge or prove that any member of the public suffered monetary loss must be regarded as significant in a proceeding in which a review of the charges discloses that subordinates on the legal staff dredged up every single instance of the most technical and insignificant type of violation dating back as far as 1939, more than twenty-three years stale. It is certain that, had there been any instances of members of the public suffering monetary loss, they would have been charged.

A strong factor in favor of the conclusion of the Hearing Examiner as opposed to that of the Commission is the fact that, in all of its history of operation for more than one hundred years the San Francisco Mining Exchange had never previously been charged or cited by any enforcement or regulatory agency of any kind, Federal, state, or local. This fact was testified to without challenge by both the president of the Mining Exchange, George J. Flach (Tr., p. 2100) and its longtime secretary, Frank J. Carter (Tr., pp. 2200-01).

2. The Commission Charged the Mining Exchange for Its Failure to Retain Legal Counsel—But It Closed Its Mind Against Him When He Sought to Confer About Rehabilitation.

Another point that the Commission relied upon as a basis of its conclusion was the contention that:

“The Exchange has been given an overabundance of opportunities to organize itself and operate in a manner consistent with its responsibilities under the law.” (p. 9 of Findings and Opinion of the Commission)

One compelling answer to that argument is that, as the Commission itself charged and found:

“Apart from the retention of counsel in anticipation of and in connection with these proceedings, the Exchange had never regularly retained or sought the advice of counsel.” (“Findings and Opinion”, p. 10)

The Commission thus exposes itself as criticizing the Mining Exchange for not retaining legal counsel and even cites that failure as a reason for terminating the registration of the Exchange. Yet, when the Mining Exchange first retained counsel, and he requested a conference to discuss a plan of rehabilitation, he was rebuffed crisply by the Associate Director of the Division of Trading and Exchanges, who wired:

“REHABILITATION IMPOSSIBLE.”

D. The Mining Exchange Has Survived a Period of Four Years of the Most Severe Probation Without New Charges Being Filed.

At this date, almost four years later, it is a demonstrable fact that, since legal counsel was engaged by the Mining Exchange, it has not been charged or cited for any alleged violations of either statute or rule.

The Mining Exchange has survived a four year period of probation of the most severe type, and under the closest and most critical of scrutiny.

The record of the past four years of operation of the Mining Exchange supports the conclusion of the Hearing Examiner that a further opportunity for reorganization and rehabilitation, under the guidance of legal counsel, is in the public interest and warranted by the record.

Both the record of proceedings and the record of performance support the conclusion and the remedy of the Hearing Examiner and contradict those of the Commission.

The "Order Withdrawing Registration of National Securities Exchange" as entered on April 22, 1966 should be set aside. It should be modified by the entry of an order and judgment providing for a reorganization of the Mining Exchange in accord with the recommendations of the Hearing Examiner.

Such a reorganization should be under Court direction, not under the supervision of a strongly biased and prejudiced Commission.

**VI. SUBSTANTIAL ISSUES OF LAW HAVE BEEN PRESENTED—
THE STAY OF THE COMMISSION'S ORDER SHOULD BE
EXTENDED UNTIL FINAL DETERMINATION.**

Petitioner submits that in this, its "Petition to Review, Modify and Set Aside, and to Stay, an Order of the Securities and Exchange Commission", it has stated substantial issues of law requiring the consideration of this Honorable Court. It submits that, pending the final

determination of those issues, the stay heretofore granted by this Court by written order on May 3, 1966 should be continued in force and effect until such final determination, in order that the Commission's order terminating the registration of petitioner may be held in suspense pending that final determination.

Dated, San Francisco, California,
June 20, 1966.

Respectfully submitted,

GARDINER JOHNSON,
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JOHN M. ANDERSON,
Attorneys for Petitioner.

JOHNSON & STANTON,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GARDINER JOHNSON,
Attorney for Petitioner.

(Appendix Follows)

Appendix.

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.
April 22, 1966

In the Matter of	:	
SAN FRANCISCO MINING EXCHANGE	:	FINDINGS
	:	AND
File No. 10-38	:	OPINION
	:	OF THE
Securities Exchange Act of 1934 -	:	COMMISSION
Section 19(a)(1)	:	

REGISTRATION OF NATIONAL SECURITIES EXCHANGE

Grounds for Withdrawal of Registration

Failure to Enforce Compliance with Exchange
Act and Rules Thereunder

Public Interest

Where registered national securities exchange over period of years repeatedly failed and neglected to enforce compliance with Securities Exchange Act of 1934 and rules thereunder by members and by issuers of securities listed thereon, and lent its facilities to unlawful securities distributions; where its officials themselves engaged in repeated violations of that Act and Securities Act of 1933; and where Exchange does not perform any significant function as a trading market, held, necessary and appropriate for protection of investors to withdraw registration of Exchange.

Opportunity for Rehabilitation

Withholding order of withdrawal pending attempt at rehabilitation by Exchange found to have pervasive and serious deficiencies is not warranted where Exchange has failed to avail itself of prior opportunities to take corrective measures and where, if effective rehabilitation is to be achieved, complete reorganization and change of personnel constituting in effect organization of entirely new exchange would be necessary.

FRANCES:

Frank E. Kennamer, Jr., Edward B. Wagner and William P. Sullivan,
of the Division of Trading and Markets of the Commission.

Gardiner Johnson, of Johnson & Stanton, for the San Francisco
Exchange.

- - - - -

Under Section 19(a)(1) of the Securities Exchange Act of 1934
(Exchange Act"), this Commission is authorized, if in our opinion such

action is necessary or appropriate for the protection of investors, to withdraw the registration of a national securities exchange if we find that such exchange has violated any provision of the Exchange Act or of the rules thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member of the exchange or by an issuer of a security registered thereon. These proceedings were instituted to determine whether or not withdrawal of registration should be ordered against the San Francisco Mining Exchange ("Exchange").

After appropriate notice, hearings were held before a hearing examiner at which the Exchange stipulated to and admitted many of the factual matters alleged in the order for proceedings and additional evidence was received with respect to certain of those matters. Thereafter proposed findings and conclusions and briefs were filed by our Division of Trading and Markets ("Division") and by the Exchange, and the hearing examiner issued his recommended decision.

The hearing examiner found among other things that there had been numerous and repeated violations involving issuers, members and officials of the Exchange; that the Exchange had not made any effort to enforce compliance by issuers or members with the Exchange Act or to enforce its rules adopted pursuant to the Act; that the Exchange had been a vehicle for evading and circumventing provisions of the securities acts designed for the protection of investors and in the public interest; and that remedial action must be taken in the public interest. The examiner, however, upon consideration of statements received from various public officials and others, and considering the Exchange as an institution distinguishable from its management, recommended that the Exchange be given a further opportunity to effect a complete reorganization and that if it failed to do so within 90 days the registration of the Exchange be withdrawn forthwith.

The Division filed exceptions and a brief urging that the registration of the Exchange be withdrawn. The Exchange excepted to a limited number of the hearing examiner's findings but only insofar as they might state or imply that the Exchange was not interested or willing to consider and effect an appropriate reorganization, and the Exchange supported the hearing examiner's recommendation that it be given a further opportunity to reorganize.

After hearing oral argument and on the basis of an independent review of the record we make the following findings.

The Exchange, an unincorporated business association, has been registered pursuant to Section 6 of the Exchange Act since June 1, 1936. 1/ George J. Flach has been president of the Exchange since 1933 and Frank J. Carter was secretary from 1936 and chairman of the Stock List Committee from 1950 until his death in 1965. Raymond A. Brown has been treasurer since 1933, a member of the Governing Committee since 1936, and a member of the Stock List Committee since 1950. Archie H. Chevrler was a member of the Governing Committee and the Stock List Committee from 1957 until 1962, and he was vice president of the Exchange and Chairman of the Governing Committee for a short period of time until he resigned these positions in March 1962. His offices were taken over first by Walter D. Forsyth, who had been a member of the Governing Committee since 1944, and subsequently in April 1962 by Paul W. Schwarz w

1/ The Exchange was first organized in 1862 under the name of the San Francisco Stock and Exchange Board. It took its present name in 19

rior occasions going back to 1951 had served as vice president of the Exchange and chairman of the Governing Committee.

As of December 1962 the Exchange had 13 regular members, of whom six were actively engaged in the securities business, and those six as representatives of three registered broker-dealer firms. Flach, Hudson and Samuel Apple represented R. L. Colburn Co. ("Colburn"), a corporation with offices in Los Angeles and San Francisco; 2/ Broy and J. Herrman represented the Broy Company, a sole proprietorship; Forsyth traded as a sole proprietor until his death in 1963. In recent years almost all of the active trading on the floor of the Exchange was conducted by Flach, Broy, Herrman and Chevrier. Aside from Carter, the Exchange had only one salaried employee, the brother of Flach, whose duties were to work the blackboard during trading sessions, deliver the book and prepare daily quotation sheets and monthly summaries. During 1962 an average of 42 stocks, having an average price per share of 14¢, were listed for trading on the Exchange. Of these 42 listed companies, at least 15 had no revenue, and 8 others had revenue of less than \$1,000. Of the four listed companies had net earnings, and three of these had trading markets through listings on other exchanges. Of the 42 companies, 10 did not have a book value of more than 1¢ per share, and nine of these had no book value at all. Of the remaining 26 companies, 24 had a book value of 20¢ or less per share. As of December 1962, 25 of the 42 companies were not actively engaged in operations.

Most of the facts found by the hearing examiner with respect to the operations of the Exchange and the violations are not disputed. We set forth his findings of fact and repeat and summarize them here to the extent necessary to give a full understanding of the issues presented to us.

Failure to Take Action With Respect to Violations by Issuers and Exchange Members

Various issuers of securities registered on the Exchange failed to file or filed late the annual and interim current reports required by the Exchange Act and the rules thereunder. 3/ In some instances the violations by a particular issuer occurred repeatedly over several years. The Exchange took no steps to enforce compliance with the reporting requirements, despite the fact that repeated violations were obvious on the face of reports filed late and any failure to file an annual report was evident from the Exchange's own records, and despite previous warning letters by our staff to Carter as secretary of the Exchange calling attention to the violations.

Thus, the annual reports of Operator Consolidated Mines Company ("Operator") for 1942, 1943, 1944, 1945, 1946 and 1950 were filed late in periods ranging from two months to seven months. Operator also failed to file any current reports in 1956 with respect to an assessment levied on its outstanding shares, the sale of certain shares for which the assessment was not paid, and a charter amendment increasing its authorized shares from 3,000,000 to 10,000,000. Flach was Operator's president and a major stockholder and Carter was a holder of Operator stock at the time these reporting violations occurred.

Colburn's main office is in Los Angeles; Flach has been employed as manager of its San Francisco branch office.

Section 13(a) of the Exchange Act and Rules 17 CFR 240.13a-1 and 240.13a-11 thereunder require every issuer of a security registered on a national securities exchange to file, with this Commission and with the exchange, an annual report within 120 days after the close of the fiscal year.

(Continued)

Reorganized Carrie Silver-Lead Mines Corp. was late in filing annual reports for 1939, 1940, 1942, 1944, 1945 and 1946 by periods of two months to 11 months. Consolidated Virginia Mining Co. ("Consolidated") was late in filing its annual reports for 1953, 1955, 1957 and 1958, the delinquencies ranging from one month to seven months. Consolidated also failed to file a current report in 1956 with respect to its issuance of over 12,000,000 shares of its stock in exchange for the stock of Hampton Mining Co. Eureka Company failed to file an annual report for 1955. On the basis of some of these delinquencies as well as other violations of the Exchange Act, this Commission itself ultimately withdrew the securities of these four issuers from registration on the Exchange. 4/

Ambrosia Minerals, Inc. ("Ambrosia") filed an application with the Exchange for registration in May 1956 which contained financial statements certified by an accountant who was secretary-treasurer of the company and accordingly was not independent as required. Flach and Cart were both acquainted with officials of the company, and after the application for listing had been filed and before it was approved Flach received an option to purchase 6,000 shares of Ambrosia stock, but they did not note or take corrective action with respect to the deficient financial statements. Subsequently we withdrew the registration on the Exchange of the Ambrosia stock because of Ambrosia's failure to comply with registration and reporting provisions of the Exchange Act. 5/

As we noted in two of the proceedings in which we found it necessary to initiate action to delist securities registered on the Exchange, delays and failures to comply with reporting requirements can not only frustrate the statutory objective of keeping existing and potential investors informed of material corporate activities and events, but also can serve to help conceal public distributions of unregistered securities in violation of the Securities Act of 1933 ("Securities Act"). 6/ The record in the instant proceedings shows how in other instances the Exchange's failure to require compliance with the Exchange Act by its members or issuers also led to or facilitated violations of the Securities Act.

3 contd./

each fiscal year, and a current report within 10 days after the close of each month during which there occurs any of a number of specified events which are considered material information for investors.

4/ Operator Consolidated Mines Company, 39 S.E.C. 580 (1959); Reorganized Carrie Silver-Lead Mines Corporation, 29 S.E.C. 49 (1949); Consolidated Virginia Mining Company, 39 S.E.C. 705 (1960); Eureka Company, 38 S.E.C. 475 (1958). The Exchange suspended trading in the Operator and Eureka stocks, but only after the institution of our proceedings against those companies.

5/ 39 S.E.C. 734 (1960).

6/ Eureka Company, 38 S.E.C. 475, 483-484 (1958); Consolidated Virginia Mining Company, 39 S.E.C. 705, 709 (1960).

In 1954 Chevrier acquired control of Comstock, Ltd. ("Comstock"), an inactive corporation with virtually no assets, and he became president and Carter vice president. With the assistance of Carter, Chevrier caused the Comstock stock to become registered and listed on the Exchange in 1955. In 1956 Chevrier entered into an agreement for the merger of Comstock with a company in the charcoal business. In connection with such agreement Chevrier purported to sell a controlling block of 500,000 shares of Comstock stock to six persons but under circumstances whereby the alleged purchasers merely received an option to purchase the shares and Chevrier still remained the beneficial owner thereof. Nevertheless Comstock filed with us and the Exchange a current report in February 1957 falsely reporting the transactions as a sale, for the obvious purpose, as the hearing examiner found, of having it appear that neither Chevrier nor any of the six purported purchasers was the beneficial owner of 10% or more of the outstanding stock. Carter, who received the report as an officer of the Exchange, knew or should have known of the false or misleading nature of the report in view of his connections with the issuer. Thereafter during 1957 H. Carroll & Son ("Carroll"), a registered broker-dealer, made a public distribution of Comstock shares, obtaining the shares it sold to the public from the controlling block of 500,000 shares optioned by Chevrier and also from shares purchased on the Exchange by Chevrier. Chevrier purchased over 100,000 shares on the Exchange for Carroll's account in a two month period during which the stock's price increased by more than 40%, thereby manipulating the price in such a manner as to facilitate the over-the-counter distribution being conducted by Carroll.

In the distribution of the Comstock shares false and misleading representations were made in violation of the anti-fraud provisions of the Securities Act and of the Exchange Act. Carter as secretary of the Exchange received a letter sent by Comstock to its stockholders and a brochure used by Carroll, both of which contained misrepresentations as to Comstock's assets and prospects, but he did nothing. Only after learning that the matter was under investigation by our staff did the Exchange suspend trading in Comstock shares. 7/

Finally we note that Comstock's annual reports for 1955 and 1956 do not contain the required financial statements due to the fact that, as a result of dissension that had arisen between Chevrier and the group connected with the charcoal company, Chevrier had retained and refused to return certain corporate records. Although Carter received a copy of the letter from Comstock to Chevrier demanding the return of corporate records and an application to the Exchange by Comstock for delisting of the stock stated that the wrongful withholding of records by Chevrier was a principal reason for Comstock's inability to comply with the reporting requirements, neither Carter nor the Exchange made any inquiry or investigation of the charges against Chevrier and took no action in respect thereof.

In 1960 Chevrier was president, director and a principal stockholder of Best & Belcher Gold and Silver Mining Corporation ("Best and Belcher"), a company whose stock was registered on the Exchange but which had been dormant for about 20 years and which had net assets of \$2,943,

and subsequently revoked Carroll's registration as a broker-dealer based on findings, among other things, of violations of the registration and anti-fraud provisions of the Securities Act and the Exchange Act in the offer and sale of Comstock shares. H. Carroll & Son, 39 S.E.C. 780 (1960).

current assets of \$609, and current liabilities of \$6,901. As part of plans to merge certain other companies with a company whose stock was registered on the Exchange, and in order to avoid certain restrictions arising from the fact that Best & Belcher was incorporated in California, Chevrier in October 1961 caused Industrial Enterprises, Inc. ("Industrial") to be incorporated in Nevada, and thereafter caused Best & Belcher to become merged into Industrial. Chevrier and Arnold Toew, another member of the Exchange, became directors of Industrial, and the Industrial stock was listed on the Exchange in place of the Best & Belcher stock. Chevrier, for his own and family accounts and as agent for certain non-member brokers, engaged in heavy trading in Best & Belcher stock on the Exchange prior to the merger, and the price of the stock went from 17¢ in September 1961 to \$1.75 per share in December.

In December 1961 Industrial acquired a controlling interest in Caloric Foods, Inc. ("Caloric"), a promotional company which allegedly owned certain formulas for the production of low calorie diets. In connection with such acquisition Industrial issued 750,000 shares of its stock. In January 1962 the Exchange approved the registration and listing of the additional 750,000 shares, despite the absence of certified financial statements of Caloric in the listing application. Thereafter trading in the Industrial stock took place at prices increasing from about \$1.75 to \$2.25 per share, and it led Schwarz to advise our regulatory staff of what he considered the unusual activity and market behavior in the Industrial stock and of the fact that Chevrier was touting that stock. After our staff began an investigation, the Exchange rescinded its approval of the supplemental listing of the 750,000 shares, and we suspended trading in the Industrial stock on the Exchange. 9/

The Best & Belcher-Industrial situation presents an example, as the hearing examiner found, of the use of a "corporate-shell game," by an official of the Exchange, who engaged in a scheme whereby, through merger and manipulative trading on the Exchange, the stock of a long dormant company was raised from about 17¢ per share to \$2.25 per share in about five months, to the substantial profit of the Exchange official and others, and in violation of the registration, anti-fraud and other provisions of the Securities Act and of the Exchange Act. 10/

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- 8/ A total of only 5,000 shares of Best & Belcher shares was traded on the Exchange in the nine months January - September 1961, of which 3,000 had been purchased in September by Chevrier. Trading in November reached a total of 68,940 shares, with Chevrier purchasing 47,100 shares and selling 54,140 for his various accounts.
- 9/ After successive orders by us pursuant to Section 19(a)(4) of the Exchange Act suspended trading on the Exchange from March to October 1962, the Exchange made an application, which we granted, to stricken the Industrial stock from listing and registration on the Exchange.
- 10/ In June 1962 the Exchange suspended Chevrier pending the outcome of administrative proceedings instituted against him under the Exchange Act. Subsequently, we revoked Chevrier's registration as a broker-dealer and expelled him from the Exchange on the basis of findings that he had engaged in a manipulative scheme with respect to the Best & Belcher-Industrial stock, filed false reports and failed to file required reports under Section 16 of the Exchange Act, confirmed transactions as agent and charged commissions when acting as principal, and falsified his records. Securities Exchange Act Release No. 7579 (April 22, 1965).

In May 1961 the Exchange approved a supplemental listing of 100 shares of stock of Apex Minerals Corporation which had been sold to a promoter of the company who also became its president, and its associates. The listing application claimed that these shares were exempt from registration under the Securities Act on the ground that they had been "acquired for investment only and not for resale or distribution." Nevertheless, both before and after the supplemental listing Broy, who was then a member of the Exchange's Stock List and Listing Committees, sold a substantial number of these shares on the Exchange for the account of Apex's promoter-president, under circumstances which, as the hearing examiner found, constituted an illegal distribution of unregistered stock in violation of Section 5 of the Securities Act.

In 1957 the Exchange received an application for the listing and registration of stock of Wilson Oil and Gas Company ("Wilson"). The application stated that the company had been incorporated in 1956, and in that year 7,500,000 shares had been sold through H. Carroll & Co., residents of Colorado, and that such sale constituted an intrastate distribution exempt from registration under the Securities Act. Although the Exchange received information that a number of stockholders had residences in states outside of Colorado, the Exchange approved the listing without making any inquiry or investigation as to compliance with the Securities Act. 11/

The Exchange maintained no procedures for discovery and prevention of violation of Regulation T issued by the Board of Governors of the Federal Reserve System under Section 7 of the Exchange Act. In over 25 years of the Exchange's existence only about 100 requests for extensions of time for receipt of payment were made to it by its members. In the San Francisco office of R. L. Colburn Company managed by Flach an inspection in 1962 disclosed 55 instances in which credit had been illegally extended by Flach, with the periods of delinquency in which no action was taken to cancel or liquidate transactions in which payments were not received within the prescribed time ranging up to 12 years. 12/

In addition, in numerous instances Flach and other members and officers of the Exchange failed to comply with the reporting requirements of Section 16(a) of the Exchange Act and Rule 17 CFR 240.16a-1. 13/ For

When the above facts became known to our staff, it requested and secured withdrawal of the Exchange's certification of listing of the Wilson stock.

Subsequently in administrative proceedings before us we found that Colburn, aided and abetted by Flach, extended credit in willful violation of Section 7(c) of the Exchange Act and Regulation T as well as failed to notify customers that it was acting as broker for both buyer and seller, and in addition to suspensions against the firm, we found Flach to be a cause of the firm's suspensions and suspended the firm from the Exchange for 90 days, R. L. Colburn Company, Securities Exchange Act Release No. 7547 (March 9, 1965).

As applicable here, these provisions require owners of more than 10% of a class of equity securities registered on a national securities exchange and officers and directors of the issuer of such securities to file with this Commission and the appropriate exchange, reports of their beneficial ownership of equity securities of such issuers and of any changes in such ownership.

example, in the period 1941 to 1959 Flach in 16 instances failed to file on time required reports of his holdings of and transactions in stock Manhattan Gold Mines Co. ("Manhattan") and Operator during times when was president and a director, respectively, of those companies. The delays in filing such reports ranged up to 34 months. In the period 1941 to 1960, Schwarz, while an officer and a director of Manhattan, Pony Meadows Mining Co. ("Pony"), Silver Divide Mines Co., Smuggler Mining Co., Ltd., and Comstock-Keystone Mining Co., failed to file required reports in five instances and in five other instances filed reports which were late by periods ranging up to 31 months.

From 1958 to 1962 Chevrier as president and director of Industrial and a principal stockholder of Pony, failed in four instances to file reports and in eight other instances filed reports which were late by periods ranging up to three months. In five instances reports which were filed were false or incomplete in that they did not disclose the full extent of his holdings and transactions. From 1955 to 1959 Toews, as an officer and director of Comstock, Industrial and Sunburst Petroleum Corp., failed to file two reports and filed four reports which were late by periods up to seven months.

Again, although these officials and members of the Exchange were repeatedly in violation of the reporting requirements of Section 16(a) of the Exchange Act, and the reports filed late with the Exchange disclosed on their face the delinquencies involved, the Exchange took no disciplinary action nor made any efforts to enforce compliance.

As the foregoing shows and the hearing examiner found, the Exchange over a long period of time failed to enforce compliance with the Exchange Act and the rules thereunder by its members and by issuers of securities registered thereon. The violations were numerous and repeated, and were not only known to the Exchange and its officials, but various officials of the Exchange were themselves involved in violations.

The Exchange has an essential obligation to make sure that its members observe the standards of conduct required by the Exchange Act. The self-policing function of a registered national securities exchange is of the utmost importance in fulfilling the statutory scheme of cooperative regulation of the securities markets in the interest of protecting the public. Section 6(a) requires as a condition of registration as a national securities exchange an agreement, which the Exchange here supplied, to comply and to enforce, so far as within its powers, compliance by its members with the provisions of the Exchange Act and rules thereunder. Further, Section 6(b) requires, and the Exchange's constitution includes, provisions for the expulsion, suspension or disciplining of a member for conduct inconsistent with just and equitable principles of trade and for the willful violation of any provision of the Exchange Act or any rule thereunder.

The self-regulatory responsibilities imposed on a securities exchange cannot be fulfilled merely by adopting regulations for disciplining its members; Section 6(b) imposes the further duty upon the Exchange of enforcing its own disciplinary provisions. ^{14/} Notwithstanding the numerous violations of the Exchange Act by members of the Exchange, some of which have been detailed here, in more than ten years the only disciplinary actions taken by the Exchange were to fine

^{14/} See Baird v. Franklin, 141 F.2d 238 (C.A. 2, 1944), cert. denied 323 U.S. 737 (1944); Avery v. Moffett, 55 N.Y.S. 2d 215 (1945); cf. Pettit v. American Stock Exchange, 217 F. Supp. 21 (S.D.N.Y., 1963).

evrier for the use of intemperate language, and to suspend Chevrier in 1962 following the institution by us of disciplinary proceedings against him. The Exchange, itself, thus totally abdicated its vital self-regulatory function required by Section 6(b) of the Exchange Act.

Public Interest

We have found that the Exchange has violated the Exchange Act and failed to enforce compliance therewith by its members and by issuers of securities registered thereon. In the light of all the surrounding circumstances there is ample basis for concluding, as the hearing examiner did, that remedial action is required. Indeed, the Exchange has not excepted to this conclusion. Rather, it recommends that the Exchange be given another chance to set its house in order. We cannot agree, and in our opinion it is necessary and appropriate for the protection of investors to withdraw its registration.

The Exchange has been given an over-abundance of opportunities to reorganize itself and operate in a manner consistent with its responsibilities under the law. 15/ Over the years, in addition to the numerous letters from our staff with respect to reporting violations, it has been necessary for us to withdraw the registrations on the Exchange of the securities of 28 issuers on the basis of findings of violations of various provisions of the securities acts which made such delistings necessary and appropriate for the protection of investors. In 1957, after the institution during that year of four proceedings which subsequently resulted in delisting orders on the basis of findings of violations of the reporting and proxy soliciting requirements, 16/ our staff made specific written

In fact, in 1935 in connection with proceedings relating to the Exchange's registration as a national securities exchange under the Exchange Act, a hearing examiner in his recommended decision stated:

"It is the conclusion of the Trial Examiner that the San Francisco Mining Exchange had been negligent, to the time of the hearing above referred to, in adopting and enforcing rules looking toward fair trading in securities listed upon the Exchange. It seems probable that registration of the Exchange as a national securities exchange will give an opportunity for a thoroughgoing revision, by the Exchange, of its rules, and in the opinion of the Trial Examiner registration of the San Francisco Mining Exchange as a national securities exchange would at least afford the opportunity for a rehabilitation of said Exchange."

The record in the instant proceedings is a sad commentary on the willingness and ability of the Exchange in the intervening years to rehabilitate itself.

Verdi Development Company, 38 S.E.C. 553 (1958); Eureka Company, 38 S.E.C. 475 (1958); Operator Consolidated Mines Company, 39 S.E.C. 580 (1959); Consolidated Virginia Mining Company, 39 S.E.C. 705 (1960). In March 1957 the promoters of Operator were also enjoined from selling unregistered securities in violation of Section 5 of the Securities Act.

recommendations to the Exchange as to changes in rules and procedures considered necessary to enable the Exchange to meet the standards applicable to a registered national securities exchange. The Exchange up to 1962 adopted only some of these recommendations and partially carried out others. It took no action with respect to some recommendations, including those for the supervision of members' personal trading, the delisting of the securities of dormant and inactive issuers, and the improvement of listing standards.

Apart from the retention of counsel in anticipation of and in connection with these proceedings, the Exchange had never regularly retained or sought the advice of counsel. Not until 1962, when these proceedings were imminent, did the Exchange's Governing Committee hold a formal meeting to consider implementation of the written recommendations submitted by our staff in 1957. The Exchange has never made an independent investigation of the financial condition of applicants for listing or employment, a certified public accountant to examine or advise with respect to financial statements in listing applications or reports.

The Exchange's listing standards are minimal to the extreme, 17/ and even so they have not been uniformly observed. It has no organization worthy of the name; we have already noted that over the years it had only two salaried employees, Carter and one other employee, and on the Governing and Stock List committees ever actually met, with the latter committee rarely if ever holding a separate meeting. Furthermore, the Exchange does not perform any substantial or significant function as a trading market. As has been stated, as of December 1962 there were only 13 members, of whom only six were active in the securities business, the stocks listed on the Exchange had little or no underlying income or book value, and many of the issuers were dormant. Trading volume on the Exchange is small.

In view of this history of failure to prevent or punish violations, inadequate and careless procedures, inadequate standards and organization and dormant and marginal listed companies, it is evident that there is really nothing of substance to salvage of the present Exchange. It is also evident that the Exchange's principal contribution in recent years has been to provide an exchange registration and listing to some issues which had no other assets to speak of and thereby facilitate, through the Exchange mechanism, and in some instances with the knowledge or active participation of Exchange officials, illegal and fraudulent distributions of worthless or highly speculative securities to the public.

17/ Issuers were required to show only that 15% of their outstanding shares were publicly owned and that they had at least 100 public shareholders.

18/ In Operator Consolidated Mines Company, 39 S.E.C. 580, 594 (1959), we stated: "The situation here presented is one where a dormant insolvent corporation, whose chief value lay in the registration and listing of its stock on the Exchange, was reactivated by a group which accumulated various properties to be transferred to the registrant in exchange for large blocks of its stock. Most of the properties were undeveloped or of a speculative nature and in large measure were subsequently abandoned. The large blocks of stock issued in exchange therefor were not registered under the Securities Act and were issued without any restrictions or precautions to prevent illegal public distribution of unregistered securities, and in fact some of those shares were involved in a public distribution without the disclosure and safeguards inherent in registration under the Securities Act."

Any "reorganization" of this mere facade of an exchange would of necessity involve the creation of an entirely new structure, retaining nothing of the old form except possibly its name. The hearing examiner has stressed that any reorganization must include "all functional aspects" and present "entirely new personnel in every department of management without exception." Such a "reorganization" would in essence be the withdrawal of the registration of the present Exchange and the registration of a completely new exchange. We recognize this reality by withdrawing the registration of this Exchange.

We have given consideration to the views expressed by several public officials and civic and business associations that the present exchange has served a useful purpose and that it or one like it should be allowed to exist. We recognize that an area exchange, whether or not it is limited to trading in securities of mining concerns, may serve a valuable function, but we think we would not fulfill our duty to act for the protection of investors if we did not withdraw the registration of the Exchange, which as the hearing examiner found, has a history of massive and abysmal abdication of responsibility" and which because of its "aura of legitimacy" as a quasi-public institution has been used as an unsuspected tool for manipulative practices perpetrated by its officers and principal officers for their own personal and unconscionable gain. The withdrawal of its registration is, if anything, long overdue.

An appropriate order will issue.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, BUDGE and WHEAT).

Orval L. DuBois

Orval L. DuBois
Secretary

The Exchange in its brief in support of the hearing examiner's recommended decision states that if his recommendation is not approved by us, its position is that it has been denied a full and fair hearing because of our refusal to authorize the issuance of subpoenas directed to the members of this Commission and our Secretary and for the production of non-public Commission files, all allegedly for the purpose of inquiring into whether this Commission was biased or had prejudged the issues against the Exchange. We have already considered and rejected these contentions of the Exchange on three prior occasions. Securities Exchange Act Release No. 7106 (July 31, 1963); Securities Exchange Act Release No. 7136 (September 9, 1963); Securities Exchange Act Release No. 7247 (February 26, 1964). We see no reason to change our conclusions in this respect and for all the reasons stated in our prior rulings we affirm them. Nothing has been presented to indicate that the Exchange has not had a fair hearing. In fact, as we previously noted (Securities Exchange Act Release No. 7106, p. 2) in view of the nature of these proceedings we authorized the Division to take the unusual step of furnishing the Exchange a copy of the Division's investigation report prior to the institution of these proceedings. Our decision herein is based solely on the facts in this record, many of which have been admitted by the Exchange and most of which are uncontroverted.

In the United States Court of Appeals
for the Ninth Circuit

No. 20,930

SAN FRANCISCO MINING EXCHANGE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT SECURITIES AND
EXCHANGE COMMISSION

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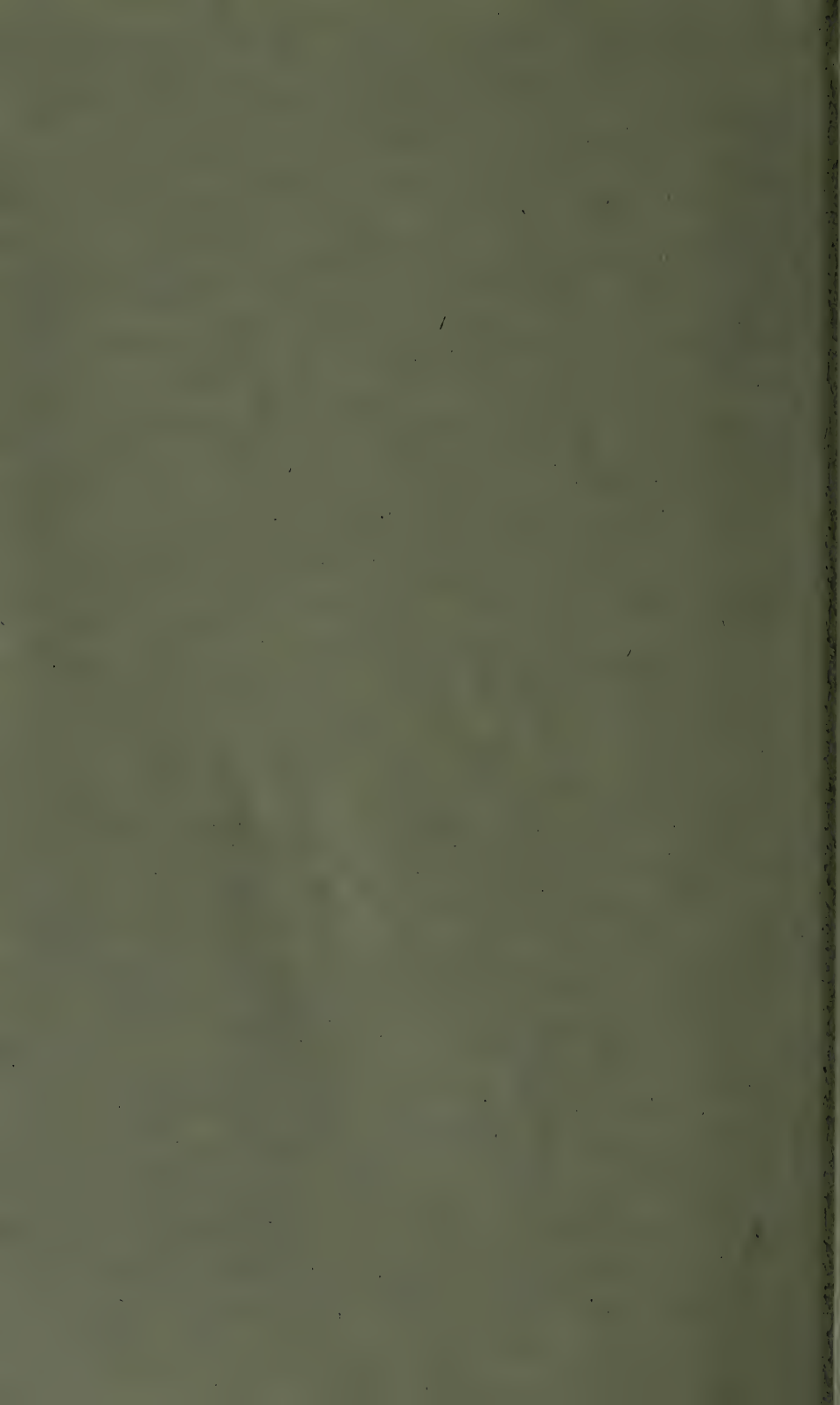
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,930

SAN FRANCISCO MINING EXCHANGE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

**BRIEF OF RESPONDENT SECURITIES AND
EXCHANGE COMMISSION**

JURISDICTIONAL STATEMENT

This is a petition by the San Francisco Mining Exchange to review an order (R. 5586-5597)¹ of the Securities and Exchange Commission entered April 22, 1966, pursuant to Section 19(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(a)(1), withdrawing its registration as a national securities exchange.² On June 22, 1966, petitioner filed a brief

¹ References to pages of the reproduced record are cited as "R. ——" and to pages in petitioner's brief as "Br.——".

² The effectiveness of this order has been stayed pending this review proceeding. See orders of this Court, dated May 4, 1966 and July 11, 1966.

which served as its petition for review.³ Jurisdiction of this Court is based on Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a).

COUNTERSTATEMENT OF THE CASE

Statutory Basis of the Proceeding

The Securities Exchange Act of 1934 imposes upon registered national securities exchanges an affirmative obligation to assist in the enforcement of the Act.

Section 6(a) of the Act, 15 U.S.C. 78f(a), requires that the registration statement of the Exchange contain an agreement obligating the Exchange:

“to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title . . . and any rule or regulation . . . thereunder.”

Section 6(b) of the Act, 15 U.S.C. 78f(b), provides:

“No registration [of an exchange] . . . shall remain in force unless the rules of the exchange

³ The proceeding in this Court was commenced by petitioner's filing its brief rather than a petition for review, as is contemplated by the rules of this Court (Rule 34.1). Therefore, filing of the certificate of the record by the Commission, designations of the portions thereof for copying, and transmission by the Commission of the designated portions of the record to the Court followed rather than preceded petitioner's brief. Because of petitioner's departure from this Court's rules, presumably the Commission's brief would not have been due until at least the due date for petitioner's brief, had it complied with the Court's rules, *i.e.*, 30 days after the Clerk of the Court has filed copies of the record with this Court (Rule 18.1). We have been advised that this was done on October 27, 1966.

include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade."

Finally, Section 19(a) (1) of the Act, pursuant to which this proceeding was instituted, empowers the Securities and Exchange Commission, after notice and opportunity for hearing, to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange "if in its opinion such action is necessary or appropriate for the protection of investors" and if it finds that the exchange:

"has violated any provision of this title or of the rules and regulations thereunder, or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

The Uncontested Findings

Petitioner concedes (Br. 41) that the hearing examiner's findings of fact were "in accordance with the stipulations, the exhibits and the oral testimony." The Commission in its opinion adopted those findings and repeated them only to the extent necessary to an understanding of the issues presented (R. 5588). These findings demonstrate that the hearing examiner and the Commission were fully justified in holding that "the [petitioner] . . . has violated the Exchange Act

and has failed to enforce compliance therewith" (R. 5594), and, indeed, that petitioner's history was one of "‘pervasive and abysmal abdication of responsibility’" (R. 5482, 5596).

In 1961, the last full year before the institution of this proceeding, stocks of only four companies with net earnings were listed on the San Francisco Mining Exchange. In all, there were 42 stocks listed on the Exchange; the average price per share of these stocks was 14¢; at least 15 of the issuing companies had no revenue and eight others had less than \$1000 of revenue. As of December 1962, twenty-five of these companies were not actively engaged in operations (R. 5588). Almost all of the active trading on the floor of the Exchange in recent years has been conducted by four of the Exchange's 13 regular members. Aside from the secretary, the Exchange had only one salaried employee, its president's brother, who was paid to put quotations on the blackboard during trading sessions and to perform other clerical and messenger functions (R. 5588).

In view of the discussion of petitioner's violations in the Commission's opinion (R. 5588-5595) and the even more extended treatment thereof in the recommended decision of the hearing examiner (R. 5405-5471), they will not be detailed here. In short, the Commission found that companies listed on the Exchange frequently filed late, if at all, the reports required by law⁴ (R. 5588-5589), and that the Ex-

⁴ Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a), and Rules 17 CFR 240.13a-1 and .13a-11 thereunder require every issuer of a security registered on a national securities

change's failure to require compliance by such companies not only "frustrate[d] the statutory objective of keeping existing and potential investors informed of material corporate activities and events" but also served "to help conceal public distributions of unregistered securities in violation of the Securities Act of 1933" and to facilitate other violations of that Act, including violations of its antifraud provisions (R. 5589). Over the years, the Commission has had to delist from the Exchange securities of twenty-eight companies by reason of their violations (R. 5594). Among the listed companies which have flagrantly violated the reporting requirements was a company of which the president of the Exchange was president and a major stockholder (R. 5588). The treasurer of the Exchange, in violation of the registration provisions of the Securities Act of 1933, sold large blocks of stock of another company listed on the Exchange on behalf of that company's promoter (R. 2361, 5592). A member of the Governing Committee of the Exchange and of the Stock List Committee, who in 1962 became vice president of the Exchange and chairman of the Governing Committee, utilized one listed company in the year prior to the institution of this proceeding to perpetrate what the examiner and the Commission characterized as a "corporate shell

exchange to file with this Commission and with the exchange, an annual report within 120 days after the close of each fiscal year, and a current report within 10 days after the close of each month during which there occurs any of a number of specified events which are considered material information for investors.

game”⁵ (R. 5444, 5591). On a prior occasion this same official of the Exchange, with the cooperation of the Exchange’s secretary, had utilized another listed corporate shell in the distribution of large blocks of stock through false and fraudulent representations, and a false report concerning his stock ownership had been filed by the company with both the Commission and the Exchange (R. 5590).

The Commission also found that the Exchange had made no attempt to enforce the filing of stock ownership reports required of officials and large stockholders of listed corporations⁶ (R. 5592-5593). Indeed, among

⁵ This type of activity had earlier been described by the Commission in delisting the stock of another company listed on the Exchange, as follows:

“The situation here presented is one where a dormant, insolvent corporation, whose chief value lay in the registration and listing of its stock on the Exchange, was reactivated by a group which accumulated various properties to be transferred to the registrant in exchange for large blocks of its stock. Most of the properties were undeveloped or of a speculative nature and in large measure were subsequently abandoned. The large blocks of stock issued in exchange therefor were not registered under the Securities Act and were issued without any restrictions or precautions to prevent illegal public distribution of unregistered securities, and in fact some of those shares were involved in a public distribution without the disclosures and safeguards inherent in registration under the Securities Act.” *Operator Consolidated Mines Company*, 39 S.E.C. 580, 594 (1959).

⁶ Section 16(a), 15 U.S.C. 78p(a), and the rules promulgated thereunder require beneficial owners of more than 10 percent of a class of equity securities registered on a national securities exchange and officers and directors of the issuer of such securities to file with the Commission and appropriate

the repeated violators in this regard were the president and vice president of the Exchange. One member active in the management of the Exchange filed several false reports (R. 5593). Despite these open and notorious violations no disciplinary action was taken concerning them, and indeed, the only disciplinary action taken in more than 10 years was to fine one member in 1961 for the use of intemperate language and to suspend him in 1962 after the Commission had instituted a disciplinary proceeding against him (R. 5593-5594).

SUMMARY OF ARGUMENT

1. The uncontested record establishes that the Exchange for years had permitted violations of the securities laws by its members and listed companies, thereby depriving investors of essential protections and facilitating the manipulation of security prices on the Exchange. The Exchange has had innumerable opportunities to reform but has not done so. Accordingly, the Commission's decision that withdrawal of the Exchange's registration was the appropriate remedy was fully justified. This was a policy determination which court decisions make clear was well within the Commission's discretionary authority. The Commission, which is entrusted with the responsibility of protecting the public, was not required to adopt the remedy recommended by its hearing examiner nor to accept the suggestions made by certain

exchanges reports of their beneficial ownership of equity securities of such issuers and of any changes in such ownership.

public officials and others that the Exchange should be allowed to continue. The record amply demonstrates injury to the public, and the fact that public investors were not called to testify is irrelevant.

2. The material upon which the Exchange relies to demonstrate bias and prejudice shows only that the procedures employed by the Commission in this case conform to the standard practice of administrative agencies, and that a special concession was made for petitioner's benefit in that it was permitted to review the investigation report of the Commission's staff in advance of the institution of proceedings. Even if the Commission or any of its members had believed, prior to instituting the proceeding, that withdrawal of the Exchange's registration was the only appropriate remedy should the charges in the staff report be ultimately established, this would not have been a disqualifying prejudgment.

Courts have held that to subpoena Commission members and documents on the issue of disqualification a party must make some independent showing pointing to possible bias or prejudice. Permitting random inquiry into the state of mind of administrative adjudicators would be destructive of the administrative process. Here counsel for the Exchange had no independent evidence of bias; indeed, ~~in that~~ he conceded that he merely wanted to explore the question of whether evidence existed to justify a formal charge of bias or prejudice. Moreover, the petitioner did not comply with applicable requirements of the Administrative Procedure Act.

ARGUMENT

I. The Commission's Withdrawal of the Exchange's Registration, in the Light of the Uncontested Facts, Was Well Within the Commission's Discretionary Authority.

A. *The Remedy Ordered by the Commission Is Warranted by the Record.*

Petitioner argues that the Commission's withdrawal of its registration as a national securities exchange, found by the Commission to be necessary and appropriate for the protection of investors (R. 5594), was not warranted by the record, and that the Commission should have adopted the hearing examiner's suggested remedy of granting the Exchange an opportunity to attempt a complete reorganization (Br. 41). It seeks to have this Court set aside the Commission's order and provide for a reorganization under a court's—apparently this Court's—supervision (Br. 49).

The Commission's withdrawal of the Exchange's registration was clearly justified in light of the undisputed finding that the Exchange "totally abdicated its vital self-regulatory function required by Section 6(b) of the Exchange Act" (R. 5594).⁷ As the Commission noted (R. 5593):

⁷ *Baird v. Franklin*, 141 F.2d 238 (C.A. 2, 1944), *certiorari denied*, 323 U.S. 737 (1944), holds that a failure by an Exchange to enforce its own rules against members is a violation of Section 6(b) of the Exchange Act. Such inaction by an exchange would accordingly come within both bases for withdrawal of registration under Section 19(a)(1). That is, it would constitute both a violation of the Act by the Exchange and a failure to enforce the Act.

“The self-policing function of a registered national securities exchange is of the utmost importance in fulfilling the statutory scheme of cooperative regulation of the securities markets in the interest of protecting the public.”

The Commission contrasted this responsibility of an exchange with petitioner’s “history of failure to prevent or punish violations, inadequate and careless procedures, inadequate standards and organization, and dormant and marginal listed companies” (R. 5595).

Since the Commission found there was “nothing of substance to salvage of the present Exchange” (R. 5595), it appropriately held (R. 5596) :

“Any ‘reorganization’ of this mere facade of an exchange would of necessity involve the creation of an entirely new structure, retaining nothing of the old form except possibly its name. The hearing examiner himself stressed that any reorganization must include ‘all functional aspects’ and present ‘*entirely new personnel in every department of management without exception.*’ Such a ‘reorganization’ would in essence be the withdrawal of the registration of the present Exchange and the registration of a completely new exchange. We recognize this reality by withdrawing the registration of this Exchange.” (Emphasis in original.)

As the Commission pointed out, the Exchange has had innumerable opportunities to reform itself. That its activities fell far short of the required standard of behavior had been brought to its attention by numerous letters from the Commission’s staff with re-

spect to reporting violations and by the fact that the Commission had found it necessary to withdraw the registration of securities of 28 companies listed on the Exchange "on the basis of findings of violations of various provisions of the securities acts . . ." (R. 5594). Moreover, as the Commission noted (R. 5594-5595):

"In 1957, after the institution during that year of four proceedings which subsequently resulted in delisting orders on the basis of findings of violations of the reporting and proxy soliciting requirements, our staff made specific written recommendations to the Exchange as to changes in rules and procedures considered necessary to enable the Exchange to meet the standards applicable to a registered national securities exchange. The Exchange up to 1962 adopted only some of these recommendations and partially carried out others. It took no action with respect to some recommendations, including those for the supervision of members' personal trading, the delisting of the securities of dormant and inactive issuers, and the improvement of listing standards." (Footnote omitted.)⁸

⁸ On March 26, 1962, the Exchange did adopt a rule concerning member trading (R. 2656).

No efforts have been made to reform the Exchange during the pendency of this proceeding, apparently on the advice of its counsel that such action might be "contemptuous" (R. 5574) or taken "'presumptively'" (*sic*) (R. 5584). We are aware of no basis for this assumption and counsel for petitioner admitted at oral argument before the Commission that no member of the staff had ever stated that the Exchange should not correct its procedures during the pendency of this proceeding (R. 5583-5584).

B. The Remedy Ordered by the Commission Is a Policy Determination Within Its Discretion.

Section 19(a)(1) provides that the Commission may suspend or withdraw the registration of a registered exchange "if in its opinion such action is necessary or appropriate for the protection of investors" and if it finds, after hearing, that the exchange has violated any provision of the Act or has failed to enforce compliance with the Act. In interpreting the parallel clause (3) of § 19(a), which authorizes the Commission to suspend or expel any member from a national securities exchange if in the Commission's "opinion such action is necessary or appropriate for the protection of investors" and that member is found after hearings to have violated any provision of the Act, the Court of Appeals for the Second Circuit has stated that it was "without power to supervise the Commission's discretionary determination that expulsion of the petitioner is necessary and appropriate for the protection of investors." *Wright v. Securities and Exchange Commission*, 112 F.2d 89, 95 (1940). The court also noted in that case:

"Congress has defined the conduct that is unlawful and has left to the administrative agency, subject to judicial review, discretion to determine whether protection of investors requires that one who has been found guilty of unlawful conduct on a national securities exchange should be temporarily or permanently excluded from carrying on activities as a member of such an exchange." (112 F.2d at 94-95.)⁹

⁹ Other holdings with respect to the Commission's broad discretion in determining suitable remedies and sanctions for

The Commission's conclusion that, because of the Exchange's repeated failures to prevent or punish violations by its members and its listed issuers, the public interest requires withdrawal of the Exchange's registration—rather than some other remedy—is a policy determination wholly within the broad discretion given to the Commission by Congress in entrusting it with the responsibility of effectuating the statutory policies. As the Supreme Court noted in *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 112-113 (1946):

“It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy ‘the relation of remedy to policy is peculiarly a matter for administrative competence.’ . . . Its judgment is entitled to the greatest weight. While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter.”

See also *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 208 (1947), where it was

violations of the Securities Exchange Act include: *Pierce v. Securities and Exchange Commission*, 239 F.2d 160 (C.A. 9, 1956); *Associated Securities Corp. v. Securities and Exchange Commission*, 283 F.2d 773 (C.A. 10, 1960); *Boruski v. Securities and Exchange Commission*, 289 F.2d 738 (C.A. 2, 1961); *Berko v. Securities and Exchange Commission*, 316 F.2d 137, 141-142 (C.A. 2, 1963). See also *Nassau Securities Service v. Securities and Exchange Commission*, 348 F.2d 133, 136 (C.A. 2, 1965).

stated that "reversal of the Commission's judgment" was precluded "save where it has plainly abused its discretion in these matters." In that case, as in this, the facts were undisputed. Under such circumstances, the Court noted that it was "free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation" (332 U.S. at 207).

The Supreme Court has recently articulated the underlying reasons for allowing an agency broad discretion in fashioning remedies:

"It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." (Footnotes omitted.) *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620-621 (1966).¹⁰

¹⁰ See also, *Federal Communications Commission v. WOKO, Inc.*, 329 U.S. 223, 229 (1946), where the Supreme Court made it clear with respect to another administrative agency that "it is the Commission, not the courts, which must be satisfied that the public interest will be served And the fact that we might not have made the same determination on the

C. The Commission Is Not Required to Adopt the Remedy Recommended by Its Hearing Examiner or Suggestions of Petitioner's Witnesses.

Since it concluded on the basis of the record that withdrawal of petitioner's registration as a national securities exchange was "necessary and appropriate for the protection of investors" (R. 5594), the Commission was not compelled to adopt the lesser remedy recommended by its hearing examiner. In the light of its responsibility to protect the public interest, the Commission could appropriately require withdrawal even if the hearing examiner had been convinced that the Exchange might be able to remedy its previous indifference to the public interest and to discontinue its affirmative misconduct. Indeed, even where the Commission might disagree with the hearing examiner as to testimonial facts, the Commission's findings are conclusive if supported by substantial evidence—not those of the hearing examiner, whose findings might also be supported by substantial evidence. See Section 25(a), 15 U.S.C. 78y(a). And see *Pierce v. Securities and Exchange Commission*, *supra* note 9, where the Commission's findings differed from those of its hearing examiner. In that connection this Court stated:

"The Commission is given the duty to protect the public. What will protect the public must involve, of necessity, an exercise of discretionary determination. This Court ordinarily should not

same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter."

substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest Since the evidence substantially supports the Findings of the Commission as to violations of law by the petitioner, we cannot conclude that the Commission abused its discretion in denying him registration." (239 F.2d at 163-164.)

See also *Consolo v. Federal Maritime Commission*, *supra* p. 14, 383 U.S. at 620: "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

In view of the Commission's responsibility to make the policy determination of whether it was in the public interest to require the registration of the Exchange to be withdrawn, it was not constrained to accept the views of officials who testified on behalf of the Exchange. In any event, the testimonials on which the Exchange relied were given before the presentation of the evidence against it had been concluded, and many of them had been written before the hearing had begun. Governor Sawyer specifically stated that he had no knowledge of the "seriousness" of the charges against the Exchange (R. 3010). The Executive Vice-President of the San Francisco Chamber of Commerce admitted, on cross-examination, that the Chamber had adopted its resolution prior to the commencement of the hearings, after an *ex parte* appearance by the Exchange's counsel accompanied by a controlling person of a "corporate shell" listed on the Exchange, and without any attempt by the Chamber

of Commerce to determine the bases for the Commission's charges (R. 1562-1587, 1591-1595, 1642-1650, 1656-1659, 1710-1730).¹¹

D. The Record Amply Demonstrates Injury to the Public and the Fact That Public Investors Were Not Called to Testify Is Irrelevant.

The petitioner's contention that it was necessary for the Commission to prove that members of the public suffered monetary losses is merely a complaint that no public investors were called to testify as to their losses (Br. 47). Section 19(a)(1) does not make a showing of monetary loss by investors a prerequisite to withdrawal of the registration of a securities exchange. The premise of the Exchange Act is that the public is entitled to the protections of that Act, including all the disclosures required therein; violations of the Act are, accordingly, injurious to the

¹¹ The California State Mining Board hedged its support for the Exchange with the proviso "that it operates within the regulations of the Security Exchange Commission, and that any irregularities within the Exchange be corrected" (R. 2973).

The statement of the American Mining Congress urging continuation of the Exchange does not appear to be based on its own knowledge but on the advice of an unnamed person or persons (R. 3011-3012).

Petitioner also contends that the American Institute of Mining Metallurgical and Petroleum Engineers, Inc. ("AIME"), supported the Exchange's position (Br. 45), but the record does not disclose any such communication from AIME. The record does contain a letter on AIME stationery which specifically states that the opinions expressed therein are not an official expression of opinion by AIME but merely the opinions of the correspondent (R. 3013).

public. As was pointed out in *Berko v. Securities and Exchange Commission*, *supra* note 9, 316 F.2d at 143,

“The Commission’s duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.”

In any event, the record amply demonstrates that the public suffered financial injury. The listing on the Exchange and distribution of the stock of Comstock, Ltd., in violation of the registration requirements of the Securities Act and the accompanying manipulation, engineered by the members of the Exchange, of the market price of the stock causing a rise in price from 1 cent to 36 cents per share (R. 5419-5436) necessarily resulted in losses to those who were enticed into the contrived market and who were holding the stock when trading was suspended and the worthless quality of the issue was revealed. Similarly, the manipulation of the market price of the stock of Industrial Enterprises, Inc. from 17 cents per share to \$2.25 per share (R. 5437-5447) is another instance where members of the public must have suffered losses through the abuse of the facilities of the Exchange.¹²

¹² See also the findings and opinion of the Commission in *Archie H. Chevrier*, Securities Exchange Act Release No. 7579 (April 22, 1965).

II. Since Nothing in the Record Suggested Bias or Prejudice on the Part of Members of the Commission, Denial of Petitioner's Applications to Subpoena Them and to Subpoena Commission Documents Relating to the Institution of the Proceeding Did Not Deprive Petitioner of Due Process of Law.

A. *The Procedures Employed by the Commission in This Case Conform to the Standard Practice of Administrative Agencies.*

The discussion in petitioner's brief in support of its contention that it was deprived of due process of law indicates a complete misconception of the administrative process, whereby an agency charged by Congress with regulating an industry determines that proceedings charging violations are to be held and also, on the basis of the evidence introduced at such proceedings, determines whether the violations have, in fact, occurred. Thus, while there is a complete segregation of staff members engaged in investigatory and prosecutory activities from those who assist the Commission in its adjudicative process, the Commission itself is necessarily responsible for both functions. For this reason, agency heads are categorically exempted from the separation-of-functions requirement of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c). As pointed out in the legislative history of that provision, this exemption "is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases."¹³

¹³ S. Rep. No. 752, 79th Cong., 1st Sess. 21 (1946).

While under legislation adopted subsequent to the institution of the instant proceeding,¹⁴ the Commission could presumably delegate its function to determine whether an administrative proceeding should be brought, it has never done so since it believes this would deprive those regulated of a measure of protection against the possibility of having to defend against unwarranted or insubstantial charges. By itself determining whether staff charges are such as to require formal proceedings, the Commission protects suspected violators against the necessity of being put to the expense and possible publicity of a hearing in the absence of a *prima facie* case against them. Accordingly, the Commission necessarily acts after consideration of the recommendation of its investigatory-prosecutory staff and may consult with that staff prior to the institution of a proceeding, just as a judge might hear, *ex parte*, a prosecutor seeking a warrant of arrest or a litigant seeking a temporary restraining order.¹⁵ And, just as in the case of such a judge,

¹⁴ 15 U.S.C. 78d-1 (Aug. 20, 1962).

¹⁵ This was recognized in the recent decision in *R. A. Holman & Co. v. Securities and Exchange Commission*, — F. 2d —, CCH Fed. Sec. L. Rep. ¶ 91,816 (C.A. 2, No. 30276, September 21, 1966), *petition for rehearing pending*, where a commissioner's participation in a proceeding was challenged because he had previously been director of a division of the staff which had conducted an informal inquiry that eventually led to the institution of administrative proceedings. The Court of Appeals held there was no disqualification, stating (CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,790) :

“In this case, there is no indication that Commissioner Woodside, *before his appointment to the Commission*, participated in any investigation of petitioner's activities,

when the Commission decides the case on the merits, it does so entirely upon the evidence in the formal record and the arguments openly presented to it.

The petitioner terms the events leading up to the institution of the proceeding against it a “fantastic prelude” (Br. 2), but the procedures employed conform to the standard practice followed by the Commission and other administrative agencies in instituting administrative proceedings. As the Commission noted (R. 5110) in ruling upon petitioner’s application for a subpoena *duces tecum*:

“The institution of these proceedings followed an investigation by the Division and a report concerning the Exchange made by the Division at our direction. This report was presented to us as the basis for determining whether to issue an order for proceedings. We thereupon authorized the issuance of the order for proceedings, which recited that the Division had alleged certain violations and ordered that hearings be held to determine whether or not such allegations were true.”

In addition, the Commission made a special concession for the benefit of petitioner in view of the fact that it had never before found it necessary to institute

and public proceedings to investigate petitioner’s activities were not started until . . . two months after Woodside’s appointment to the Commission.” (Emphasis supplied.)

The Court held that the Commission was not required to divulge staff communications to the Commission “which merely concerned the nature of the *proposed* proceedings” (emphasis supplied). CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,792.

a proceeding to determine whether the registration of a national securities exchange should be withdrawn. It authorized the staff to make available to the Exchange a copy of the staff's report ¹⁶—characterized in the proceeding as “a massive bill of particulars” (R. 39)—so that the Exchange might review and evaluate the charges against it and determine whether it would not prefer voluntary withdrawal of its registration to institution of a proceeding to determine whether withdrawal should be compelled. In making this determination, the Exchange was advised to retain counsel (R. 1497, 1550-1551). After retaining counsel, the Exchange countered with an offer to submit a plan of rehabilitation.¹⁷ The Commission's staff rejected this proposal, which might have forestalled the institution of proceedings and have resulted in a period of negotiation during which the petitioner's operations could have continued unabated. Instead,

¹⁶ Although under Section 21(a) of the Exchange Act, 15 U.S.C. 78(u) (a), the Commission could have made the report public, it did not do so. Copies of the report were furnished to the Exchange and its counsel in confidence, but when counsel for the Exchange referred to the report and characterized it in his opening statement (R. 26, 32), staff counsel requested that the Commission make the report public (R. 72-83). The staff's request was denied on December 12, 1962, but the Commission at that time authorized counsel for the Exchange to make the report public if he should choose to do so (R. 103, 5097). The report has not been made public and was never made a part of the record in the proceeding, although counsel for the Exchange had indicated he would introduce it (R. 36-38).

¹⁷ The Exchange did not attempt to deny any of the charges in the report or to bring forward any mitigating circumstances.

the staff recommended the institution of the proceeding, as it had advised the petitioner it would. Thereafter, with the staff's report available to counsel for the Exchange, the parties negotiated a stipulation of certain facts underlying the staff charges (R. 2322-2367).

B. Petitioner's Charges of Bias and Prejudice Have No Basis.

When the hearings were commenced on December 12, 1962, contrary to the claim of petitioner that "counsel followed the cautious, responsible course of making inquiry first, rather than hurling loose charges of bias and prejudice" (Br. 29), petitioner's counsel charged in his public opening statement that the Exchange had "been subjected to 'government by blackmail' and 'regulation through extortion,'" (R. 31), and that "both the report and the charges demonstrate . . . that the real gravamen of the Commission's attack upon the Mining Exchange is a fixed opinion that the Exchange should be put out of business. . ." (R. 32). The purported basis for these charges was a letter of June 28, 1962, written by the Director of the Division of Trading and Exchanges to the Commission's San Francisco Regional Administrator, stating that the Commission, after consideration of the staff's recommendation, had authorized the staff to permit the Exchange to see the staff's report and voluntarily withdraw its registration, rather than have a proceeding initiated for such withdrawal (Br. 3-4).¹⁸

¹⁸ Although petitioner purports to quote the letter verbatim, the designation, "Division of Trading and Exchanges," appear-

Thereafter, when the Division's case in the administrative proceeding had been concluded, on February 11, 1963, petitioner submitted a written application for subpoenas *ad testificandum* directed to each member of the Commission and for a subpoena *duces tecum* calling for internal correspondence, memoranda and reports relating to the institution of the proceeding against the Exchange, which was directed to Orval L. DuBois, Secretary of the Commission (R. 4966-4970). Petitioner claimed that the information to be elicited was relevant to the issue of "whether or not the members of the Securities and Exchange Commission have prejudged the issues in these proceedings and are biased and prejudiced against respondent to such an extent as to render them, and each one of them incompetent to judge said matter fairly, impartially or dispassionately" (R. 4969, 5144-5145). It is the denial of these applications for subpoenas upon which petitioner predicated its charge of lack of due process in its arguments to the Commission.¹⁹

These charges of bias, prejudice or prejudgment rested solely²⁰ upon the events which immediately

ing on the letterhead is not quoted, and petitioner has italicized words in the letter which were not emphasized in the original (R. 5077, 5999-6000).

¹⁹ The subpoena *duces tecum* was denied by both the hearing examiner and the Commission (R. 5014-5030, 5109-5113); the subpoenas *ad testificandum* were granted by the hearing examiner and denied by the Commission (R. 5137-5138, 5148-5150).

²⁰ Petitioner now states for the first time (Br. 26-28) that the fact that two members of the Commission had previously been staff officials suggests that they may have lacked "ob-

preceded commencement of the proceeding and particularly upon the letter of June 28, 1962. We do not question that the *staff* of the Division of Trading and Exchanges (now called Trading and Markets) had reached the firm conclusion that petitioner's registration should be withdrawn and that, in the words of a staff member, "Rehabilitation [is] impossible" (Br. 7). But the fact that the investigatory and prosecutory staff had reached this conclusion does not, as petitioner suggests, prove that the Commission had also reached the same conclusion. With respect to the attitude and position of the Commission, as distinct from the staff, the record shows only the following:

1. The Commission had determined that if petitioner's registration were not voluntarily withdrawn, an administrative proceeding should be commenced to determine whether or not such withdrawal should be required. As we have shown above, a determination to institute a proceeding is made by the Commission in every case in which a proceeding is commenced and shows no bias or prejudgment; otherwise, at least at the time this proceeding was commenced, which was prior to the delegation statute (see *supra*, p. 20 and n. 14), no administrative proceeding could ever have been begun.

2. The Commission had determined to afford petitioner the opportunity voluntarily to withdraw its registration rather than face a proceeding. Petitioner, of course, remained free to reject this offer, as it did.

jectivity and impartiality." As we show at pp. 34-36, *infra*, there is no merit to this contention.

Affording this opportunity to petitioner does not show bias or prejudice, rather the contrary.

3. The Commission had determined to afford petitioner the opportunity to examine the entire staff report of investigation prior to the proceeding. While not normally done, this certainly did not prejudice the petitioner in any way; rather it afforded it the opportunity to learn in advance the entire case that the staff might present.

4. The Commission had determined not to make the staff report public, at least initially, although the Commission recognized that this might occur at some later date.²¹ This again does not manifest any prejudice against the Exchange but instead protected the Exchange against the unfavorable publicity which presumably would have accompanied publication of the report.

²¹ The letter of June 28, 1962, also indicates that the Commission directed certain revisions of the staff report of investigation. Presumably, this was done in view of the possibility that the report might become a public document. In any event, since the Commission was entitled, if not required, to review the report in order to determine whether or not it should accept the staff's recommendation for proceeding, the fact that in the course of such review it directed certain revisions proves nothing with respect to bias, prejudice or prejudgment.

While the affidavit filed in support of the application for a subpoena *duces tecum* stated that the letter was "from the Securities and Exchange Commission Director," and that the letter indicated that the report was prepared "under the direction" of the Commission (R. 4969), in fact, the letter was from the Director of one of the operating divisions, the Division of Trading and Exchanges, the report is designated in the letter as a study by the staff and it is nowhere stated that the Commission supervised its preparation (R. 5999-6000).

In summary, the materials relied upon by petitioner in support of its charges of bias, prejudice or prejudgment show only that the Commission determined that there should be a proceeding, as it does in every case where a proceeding is commenced, and that in connection with the proposed proceeding, it afforded to petitioner certain privileges and advantages which are not normally provided to respondents in Commission proceedings but which the Commission thought appropriate in view of the unusual nature of a proceeding to withdraw the registration of an exchange.

Even if the Commission itself, rather than the staff of the Division of Trading and Exchanges, had prepared the report on the Exchange, this would not have made the Commission incapable of weighing all the evidence impartially in the subsequent administrative proceeding.²² Indeed, the Securities Exchange Act

²² Petitioner's original contention was that the entire Commission was biased and prejudiced (R. 4969, 2181-2184). This was later modified to "or some of them" (R. 5037). Now, since of the five members who served when the order for proceedings was issued only two, Chairman Cohen and Commissioner Woodside, were also members of the Commission when the order withdrawing registration was issued, the argument seems to be that only these two Commissioners were biased and prejudiced (Br. 26-28). The other three Commissioners, Hugh R. Owens, Hamer H. Budge and Francis M. Wheat, who participated in the decision in this proceeding did not take office until long after the date, July 26, 1962, on which this proceeding was instituted. Mr. Owens first took office as a member of the Commission on March 23, 1964; Mr. Budge on July 8, 1964; and Mr. Wheat on October 2, 1964. 31 S.E.C. Ann. Rep. XIV, XV (July-June, 1965).

It should also be noted that under the rule of necessity,

specifically authorizes the Commission to conduct investigations (see Section 21(a) and (b), 15 U.S.C., 78u(a) and (b)) and to determine, after hearing, whether in the public interest sanctions should be imposed upon persons regulated who have been found to have been guilty of violations (see §§ 15(b) and 19(a), 15 U.S.C. 78o(b) and s(a)). The law presumes that a public official charged with adjudicatory functions is a person capable of judging a particular controversy fairly and on the basis of its own circumstances. *United States v. Morgan*, 313 U.S. 409, 421 (1941); see also *National Lawyers Guild v. Brownell*, 225 F.2d 552, 555 (C.A.D.C., 1955), *certiorari denied*, 351 U.S. 927 (1956). And it has been held that due process was not denied where one or more members of an administrative board aided in an investigation and thereafter participated in the decision of the case. *Brinkley v. Hassig*, 83 F.2d 351, 357 (C.A. 10, 1936).²³ And see *Safeway Stores Inc. v. Federal*

even if petitioner had established that the Commission had prejudged the issue of withdrawal, the Commission, as the only body charged by law with the duty of withdrawing the registration of a national securities exchange, would not have been precluded from acting in this proceeding. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 701 (1948); *Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association*, 295 F.2d 403, 408 (C.A. 9, 1961).

²³ See also the *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 58, pointing out that "if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case."

Trade Commission, — F.2d — (C.A. 9, No. 19325, September 14, 1966).

Moreover, even assuming that the Commission or any of its members believed when the proceeding was instituted that withdrawal of the Exchange's registration was the only appropriate remedy should the charges in the staff's report ultimately be sustained, this would not have been a disqualifying prejudgment. Otherwise the experience which may make an individual particularly valuable as an agency member would disqualify him in the very cases in which his views would be most helpful, since such a person would normally have an opinion as to the appropriate sanction for particular violations. An official charged with adjudicatory functions may be expected to "have an underlying philosophy in approaching a specific case." *United States v. Morgan*, *supra* p. 28, 313 U.S. at 421. Indeed, it has been noted that it is unrealistic to expect and undesirable to require "the total absence of preconceptions in the mind of the judge." *In re J. P. Linahan, Inc.*, 138 F.2d 650, 651-652 (C.A. 2, 1943). As indicated in *Federal Trade Commission v. Cement Institute*, *supra* note 22, 333 U.S. at 702-703, it would not be a "violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." In that case it was held that the Federal Trade Commission was not disqualified from deciding an administrative proceeding to determine the legality of basing point practices even assuming that the Commission had already formed an opinion as to the legality of such

practices as a result of its prior investigations. The Court stated that "the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject . . ." (333 U.S. at 701).²⁴

Accordingly, there is nothing improper in a Commissioner's believing prior to the institution of a proceeding that the registration of a national securities exchange should be withdrawn if it can be shown that over a period of years it has failed to take disciplinary action against its members and issuers of securities listed thereon who have committed serious violations of the Federal securities laws.²⁵ Of course, even should all the charges ultimately be admitted, an opportunity would be afforded counsel for such an exchange, as was afforded counsel for petitioner in this case, to attempt to persuade the members of the Commission that another remedy might be preferable.

Petitioner has the burden of proof on the issue of disqualification (*Securities and Exchange Commis-*

²⁴ And see *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (C.A. 1, 1962), where it was held that the prior issuance of an accident investigation report by the Civil Aeronautics Board fixing pilot error as the probable cause of an aircraft crash did not preclude the Board from deciding whether to suspend the certificate of the pilot in the same accident.

²⁵ There is no "bias" in the invidious sense" even where a case comes before a judge who has previously stated his disbelief of the testimony of a party. See *MacKay v. McAlexander* 268 F.2d 35, 39 (C.A. 9, 1959), *certiorari denied*, 362 U.S. 961 (1960). See also *Federal Trade Commission v. Cement Institute*, *supra* n. 22, 333 U.S. at 702-703.

sion v. *R. A. Holman & Co.*, 323 F. 2d 284, 287 (C.A.D.C., 1963), *certiorari denied*, 375 U.S. 943; *R. A. Holman & Co. v. Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816 at 95,791) and it simply did not make a sufficient showing, in the words of the Court of Appeals for the Second Circuit, to become "entitled to subpoena Commission members and staff." *R. A. Holman & Co. v. Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,791. In fact, petitioner's counsel conceded that he merely wanted the subpoenas "to discover whether or not there exists evidence sufficient to justify a formal charge of bias and prejudice . . ." (R. 5121).

C. *Permitting Random Inquiry into the State of Mind of Decisional Officers Would Destroy the Administrative Process.*

It would be destructive of the administrative process to permit random inquiries regarding the state of mind of administrative adjudicators during the decisional process. *United States v. Morgan*, *supra* p. 28, 313 U.S. at 422, states:

"We have explicitly held . . . that 'it was not the function of the court to probe the mental processes of the Secretary [of Agriculture]' Just as a judge cannot be subject to such a scrutiny, . . . so the integrity of the administrative process must be equally respected."

If the comments of such adjudicators may be revealed, the free discussion required in order to arrive at a rational conclusion would be withheld because "cau-

tion or worse would remove all candor from their minds and tongues." *National Labor Relations Board v. Botany Worsted Mills, Inc.*, 106 F.2d 263, 267 (C.A. 3, 1939).²⁶ And permitting such inquiries into the decision-making process would permit litigants unreasonably to delay administrative proceedings. As the court in *Botany Worsted* noted:

"The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." (106 F.2d at 267.)

D. *The Cases Relied Upon by Petitioner Are Inapplicable.*

Petitioner's reliance (Br. 32-40) on *United States v. Andolschek*, 142 F.2d 503 (C.A. 2, 1944), *Jencks v. United States*, 353 U.S. 657 (1957), *Berkshire Employees Assoc. v. National Labor Relations Board*, 121 F.2d 235 (C.A. 3, 1941), *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (C.A. D.C., 1962), and *Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association*, 295 F.2d 403 (C.A. 9, 1961), as supporting its contention that it was entitled to the issuance of the subpoenas, is misplaced.

²⁶ The court in *Botany Worsted* further said, "The logic of this position requires the preservation from questioning of each member of the general body. . . . We are glad, therefore, to ensure to the members of the Labor Board the same protection accorded to jurors since the 18th Century. In so doing we do not disregard the fact that the Board is commanded by statute to act as prosecutor as well as judge, and to appear in this Court as a party litigant. . ." (106 F.2d at 267).

In *Andolschek* it was held that in a criminal prosecution the government could not refuse to produce documents that "directly touch[ed] the criminal dealings" ²⁷ (142 F.2d at 506). The holding in *Jencks*, was that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial" (353 U.S. at 672). The Commission did comply with the principle of the *Jencks* case, since petitioner's counsel was furnished the transcripts he requested of the statements made by a staff witness in order to facilitate cross-examination. Neither of these cases is relevant here, where the information sought by the subpoenas did not relate to any of the charges against the Exchange and did not involve statements, except for the transcripts produced, of any witnesses in the proceeding.

In *Berkshire*, *supra*, 121 F.2d at 238-239, the question was not whether the agency member involved merely had an opinion in advance of the proceeding as to the illegality of the practices by the company and the appropriate remedy, but whether the member had actually taken steps unauthorized by statute to impair that company's operations. The court held that correspondence of the member prior to the proceeding suggesting that he had been endeavoring to assist

²⁷ *Andolschek*, unlike the case at bar, "involved the prosecution of a crime consisting of the very matters recorded in the suppressed document. . ." (142 F.2d at 506).

in a boycott against the company should have been admitted into evidence so that the Labor Board could determine whether or not that member was disqualified from participating in the decision. This is not comparable to the instant case, where no evidence indicating bias has been produced. Moreover, as the *Berkshire* court noted, 121 F.2d at 239, "This is obviously not like a case . . . where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind."

In *Amos Treat, supra*, 306 F.2d 260, the charge was that the Director of the Commission's Division of Corporation Finance had had responsibility for the initiation, conduct, and supervision of an investigation factually related to a subsequent disciplinary proceeding against a broker-dealer which, upon the Director's elevation to Commissioner, he participated in instituting. Here, however, petitioner merely alleges:

"Many of the facts referred to in the charges as constituting violations occurred during the years when Messrs. Cohen and Woodside were active members of the staff, and prior to their respective appointments to membership on the Commission." (Br. 28.)²⁸

²⁸ *American Cyanamid Co. v. Federal Trade Commission*, *infra* n. 31, 363 F.2d 757, 763 (C.A. 6, 1966), is also clearly distinguishable. There the Court held that Chairman Dixon of the Federal Trade Commission was disqualified to decide the case because he, prior to his appointment to the Commission, and "in his former capacity as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United

Neither Chairman Cohen nor Commissioner Woodside had ever served on the staff of the Commission's Division of Trading and Exchanges (subsequently Trading and Markets), the Division which prepared the report on petitioner that led to the proceeding against it. Further, this contention of petitioner was not made to the Commission and, accordingly, should not be recognized here since Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), explicitly provides that "no objection to the order of the Commission shall be considered by the court unless . . . [it] shall have been urged before the Commission."²⁹ And it

States Senate, played an 'active role' in an investigation by that Subcommittee of many of the same facts and issues of the same parties as are involved in this proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties."

The Court further limited its holding as follows (363 F.2d at 768): "We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel, as shown by the record in this case, including Appendix E." This appendix to the Court's opinion, detailing the extent and nature of Chairman Dixon's involvement, is 29 pages long (363 F.2d 787-817).

This Court distinguished that case in *Safeway Stores Inc. v. Federal Trade Commission*, *supra* p. 28.

²⁹ As this Court stated in *Lile v. Securities and Exchange Commission*, 324 F.2d 772, 773 (1963):

"This provision is an express limitation upon this Court's jurisdiction in this proceeding and, upon that ground, we must dismiss the petition without reaching the merits."

See also *Gearhart & Otis, Inc. v. Securities and Exchange Commission*, 348 F.2d 798, 801 (C.A.D.C., 1965); *Gilligan*,

should be noted that the *Amos Treat* decision appears to have been limited by the determination of the same court in *Securities and Exchange Commission v. R. A. Holman & Co.*, 323 F.2d 284 (1963) and by the Court of Appeals for the Second Circuit in *Holman v. Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816. In the latter case, the Court noted that to disqualify the Commissioner involved on the record³⁰ before it "would be tantamount to disqualifying from participation in an SEC adjudicatory proceeding all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory stages, and would tend to prevent the appointment to the Commission of persons who have had previous experience with its work" (CCH Fed. Sec. L. Rep. ¶ 91,816, at 95,790).

In *Federal Home Loan Bank Board*, the holding of this Court was that the hearing examiner was not validly appointed (295 F.2d at 409). Further, the verified statement set forth as "Appendix C" to the District Court's opinion, *Long Beach Federal Savings and Loan Association v. Federal Home Loan Bank Board*, 189 F. Supp. 589, 621-622 (S.D. Calif., 1960), states that the challenged Board members were personal defendants and the association was plaintiff "in

Will & Co. v. Securities and Exchange Commission, 267 F.2d 461, 468 (C.A. 2, 1959), *certiorari denied*, 361 U.S. 896; *Nassau Securities Service v. Securities and Exchange Commission*, *supra* n. 9, 348 F.2d at 136; *Barnett v. United States*, 319 F.2d 340, 345 (C.A. 8, 1963).

³⁰ See *supra* n. 15.

bitterly contested litigation involving over 20 millions of dollars," that the association was "asking judgments, accounting, return of seized and misappropriated assets and property against said Board. . .," and that "bitter personal animosity, bias and prejudice has arisen in said Board against said Association. . . ." No comparable circumstances are present in this case.

E. *Petitioner Has Not Complied with Section 7(a) of the Administrative Procedure Act.*

The District Court in *Federal Home Loan Bank Board* found that Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 1006(a), requiring a sufficient and timely affidavit of bias and prejudice, was applicable (189 F. Supp. at 611).³¹ Nothing in the opinion of this Court, reversing the District Court on other grounds, appears to suggest that this ruling was incorrect, and recently this Court dealt with the question of timeliness under Section 7(a) where the disqualification of the Chairman of the Federal Trade Commission was sought. *Safeway Stores, Inc. v. Federal Trade Commission*, *supra* p. 28.

Section 7(a) provides in pertinent part:

³¹ The District Court's opinion on this point was recently cited by the Court of Appeals for the Second Circuit in *R. A. Holman & Co. v. Securities & Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816 at 95,792. *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 764 (C.A. 6, 1966), held that § 7(a) applies where the disqualification of a commission member is sought.

"The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

Petitioner's counsel has conceded that this procedure was not followed, stating, "We did not file an affidavit of prejudice against anyone . . ." (R. 5086). Even if the affidavit of counsel for the Exchange, which was a part of the application for the subpoena *duces tecum* directed to the Commission's Secretary (R. 4967-4970), is regarded as intended to fulfill the prerequisite of an "affidavit of personal bias and disqualification," it meets neither the requirement that it be "sufficient"³² nor the requirement that it be "timely" filed.

The District Court in the *Federal Home Loan Bank Board* case, *supra* p. 36, 189 F. Supp. at 611, stated, "'Timely' means at the first reasonable opportunity

³² The requirement of sufficiency is defined in *Long Beach Federal Savings and Loan Association v. Federal Home Loan Bank Board*, *supra* p. 36, 189 F. Supp. at 612, as follows: "'Sufficient' means allegations of fact as distinguished from conclusions. And the facts must be such that, taken to be true as stated, they would be sufficient to convince an unbiased, unprejudiced and disinterested mind." As we have seen (*supra* pp. 25-27) that requirement has not been met in the case at bar.

after discovery of the facts tending to show disqualification.”³³ The requirement that an affidavit of bias be filed promptly must be complied with because a litigant cannot be allowed to wait and decide whether he likes his subsequent treatment before raising the issue. See *Safeway Stores, Inc. v. Federal Trade Commission*, *supra* p. 28; *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (C.A. 1, 1960); *Peckham v. Ronrico Corp.*, 288 F.2d 841 (C.A. 1, 1961). Here, although all facts upon which counsel’s affidavit was based were known in July 1962, it was not filed until February 11, 1963, after extensive hearings had been held, 2300 pages of testimony had been taken, numerous exhibits presented, and the Division had concluded presentation of its case (R. 5112). *Cf. R. A. Holman & Co. v. Securities and Exchange Commission*, *supra* note 15, CCH Fed. Sec. L. Rep. ¶ 91,816 at 95,791. Even an affidavit of bias and prejudice against a trial judge filed on the day of trial has been held to be untimely where the facts upon which it was based had been known prior thereto. *Rossi v. United States*, 16 F.2d 712, 716-717 (C.A. 8, 1926); *Chafin*

³³ See *Chessman v. Teets*, 239 F.2d 205, 215 (C.A. 9, 1956), *vacated on other grounds* 354 U.S. 156 (1957); *Faubus v. United States*, 254 F.2d 797, 803-804 (C.A. 8, 1958), *certiorari denied*, 358 U.S. 829 (1958). See also *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F.2d 589, 592 (C.A. 7, 1945), *affirmed without reaching the issue of timeliness sub nom. Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703 (1948), and *North American Airlines v. Civil Aeronautics Board*, 240 F.2d 867 (C.A.D.C., 1956), *certiorari denied*, 353 U.S. 941 (1957).

v. *United States*, 5 F.2d 592 (C.A. 4, 1925), *certiorari denied*, 269 U.S. 552 (1925).

CONCLUSION

For the foregoing reasons the order of the Commission should be affirmed.

Respectfully submitted,

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Dated: November 1966

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

*/s/ David Ferber, Solicitor,
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Dated: November 1966

No. 20,930

United States Court of Appeals
For the Ninth Circuit

SAN FRANCISCO MINING EXCHANGE,

Petitioner,

VS.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONER

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United States Court of Appeals For the Ninth Circuit

SAN FRANCISCO MINING EXCHANGE,	}
<i>Petitioner,</i>	
VS.	
SECURITIES AND EXCHANGE COMMISSION,	}
<i>Respondent.</i>	

REPLY BRIEF FOR PETITIONER

I.

THE AMERICAN CYANAMID CASE, RECENTLY DECIDED IN THE SIXTH CIRCUIT, SUPPORTS PETITIONER'S CONTENTION THAT IT WAS ENTITLED TO THE ISSUANCE OF SUBPOENAS, SO THAT IT MIGHT PRODUCE EVIDENCE ON THE ISSUE OF BIAS AND PREJUDICE OF THE COMMISSION MEMBERS.

One of the major legal issues raised in our Opening Brief for Petitioner involved the contention that petitioner San Francisco Mining Exchange was entitled to the issuance of subpoenas so as to afford it an evidentiary hearing on the question of the possible bias and prejudice of one or more members of the Securities and Exchange Commission (at pp. 26-40).

In developing the argument that this point presented an example of what currently has become a major prob-

lem in the field of administrative law, we cited an eminent authority direct from the inner administrative circles. He spoke out in support of our contention that Petitioner had raised an issue of major proportions, when he wrote:

“A major problem now seems to be developing, however, around that vital phrase, ‘informed by experience.’ The question is being raised as to whether agency members can be so well ‘informed by experience’ that their minds are already closed before particular cases reach them for adjudication—whether they have, in short, ‘decided in advance’ the issues involved and are therefore, ‘disqualified’ to hear and adjudicate those matters.

“In recent weeks the agencies and the courts have been presented with a rash of ‘bias’ cases.” (Op. Br., p. 28.)

The author of that statement was the distinguished chairman of the Federal Trade Commission, Honorable Paul Rand Dixon, writing for the Federal Bar Journal on the subject “‘Disqualification’ of Regulatory Agency Members: The New Challenge to the Administrative Process” (25 Fed. B.J. 273, Summer, 1965).

Our Opening Brief for Petitioner was filed on June 21, 1966. While it was being printed for filing the Court of Appeals for the Sixth Circuit issued an opinion confirming Chairman Dixon’s worst fears for the administrative process (*American Cyanamid Co. v. Federal Trade Commission*, 363 F. 2d 757, June 16, 1966). The court (in an opinion written by Circuit Judge Harry Phillips) unanimously held *Chairman Dixon personally disqualified to sit in judgment because he had previously investigated*

many of the same facts as counsel for a congressional committee. The court went on to find that his participation in the administrative hearing and determination amounted to a denial of due process which invalidated the order under review (p. 767).

The conclusionary portion of that opinion, particularly pertinent herein, included the following statement of the controlling rule in disqualification for prior administrative "bias":

"Under the facts and circumstances of this case we conclude that *the participation of Chairman Dixon in the hearing 'amounted . . . to a denial of due process which invalidated the order under review.'* *Teraco, Inc. v. Federal Trade Commission, supra*, 336 F. 2d 754, 760 (C.A.D.C.), vacated and remanded on other grounds. 381 U.S. 739.

As said in *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 260, 267 (C.A.D.C.):

'[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness, but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.'

"In *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90, 91 (C.A.D.C.), Judge Prettyman said:

'It is plain that in this statute Congress contemplated an adjudicatory proceeding and conferred upon the Board in this respect quasi-judicial functions. The fundamental requirements of fairness in the performance of such functions require

at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.'

"It is fundamental that both unfairness and the appearance of unfairness should be avoided. Whenever there may be reasonable suspicion of unfairness, it is best to disqualify. See Prejudice and the Administrative Process, 59 Nw. U.L. Rev. 216, 231 (1964); Disqualification of Administrative Officials for Bias, 13 Vand. L. Rev. 713, 727 (1960).

It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.

The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority. 'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we may know of whereby the influence of one upon the others can be quantitatively measured.' *Berkshire Employees Association of Berkshire Knitting Mills v. N.L.R.B.*, 121 F. 2d 235, 239 (C.A. 3).

"We therefore must vacate the order and decision of the Federal Trade Commission and remand the case for a de novo consideration of the record without the participation of Chairman Dixon. We reject the argument of the Commission that such a holding

‘would create an unworkable concept of administrative bias.’ ” (At pp. 767-768, emphasis added.)

The ruling in the *American Cyanamid* case is entirely consistent with the principles enunciated in the leading authorities that we cited previously in our Opening Brief (Op. Br., pp. 32-38). In fact, the *American Cyanamid* opinion cites with approval two of the identical cases that we relied upon: *Berkshire Employees Association, etc.* (Op. Br., pp. 32-33) and *Amos Treat & Co.* (Op. Br., pp. 34-36), which latter case involved the conduct of Securities & Exchange Commissioner and Chairman Manuel F. Cohen, one of the very commissioners whom we sought to interrogate in this proceeding.

These leading authorities all held that the issue of bias and prejudice is relevant, and that evidence of bias and prejudice on the part of the members of an administrative board should be received.

The *Federal Home Loan Bank Board* case (295 F.2d 403), which we cited at pages 36-37 of our Opening Brief held specifically that subpoenas for the appearance of agency members should be issued in order that an evidentiary hearing might be held to explore the possibility of bias or prejudice on the part of one or more of the members of an agency.

II.

THE BRIEF FOR RESPONDENT MAKES NO ANSWER AT ALL TO PETITIONER'S CONTENTION THAT THE COMMISSION'S REVERSAL OF THE HEARING EXAMINER'S ORDER DIRECTING THE ISSUANCE OF SUBPOENAS TO THE COMMISSION MEMBERS THEMSELVES CONSTITUTED A DENIAL OF DUE PROCESS OF LAW.

A reading of the Brief for Respondent Securities and Exchange Commission discloses that Respondent has failed to make any response at all to one of Petitioner's major points.

The Brief for Respondent is entirely devoid of any answer to, or argument against, our contention that the Commission's order reversing the Hearing Examiner's direction that subpoenas ad testificandum be issued denied to petitioner due process of law.

It must be kept clearly in mind that on February 11, 1963, while the case for Petitioner (then the respondent) was still open, and prior to submission, its counsel presented to Hearing Examiner Ewell two separate and independent applications for the issuance of subpoenas. They were, as follows:

- (1) An Application for Issuance of Subpoena. This simply requested the issuance of a subpoena ad testificandum directed to the five members of the Commission and its secretary; and
- (2) An Affidavit and Application for Issuance of Subpoena Duces Tecum. This requested the issuance of a subpoena duces tecum to the Commission's secretary, one Orval L. DuBois.

Under the Commission's own Rules of Practice (17 CFR 201), as they then existed, different procedures

applied to the respective applications. Rule 14(b)(1) controlled the issuance of "Subpoenas". It provided:

"(1) Any member of the Commission, the hearing officer or any other officer designated by the Commission for the purpose, in connection with any hearing ordered by the Commission,

(i) *Shall* issue subpoenas requiring the attendance and testimony of witnesses at any designated place of hearing, *upon application* therefor by any party, and

(ii) *May* issue subpoenas requiring the production of documentary or other tangible evidence at any designated place of hearing, *upon written application* by any party, *which shall include a showing of the general relevance, materiality and reasonable particularity of the documentary or other tangible evidence described and the facts to be proved by them.*" (Emphasis added.)

It will be seen at once that, as to a subpoena ad testificandum, there was no requirement of either an affidavit or a showing of relevance, or even of a written application. Furthermore, upon application being made, either orally or in writing, issuance of the subpoena was *mandatory*.

A powerful argument in support of Petitioner's contention on this point is found in the circumstances that, shortly after we stressed the important distinctions in the portions of the rule pertinent to the issuance of the respective types of subpoenas, the Commission revised Rule 14(b)(1) so as to provide an identical procedure for both subpoenas ad testificandum and subpoenas duces tecum. The revised rule provided for a discretion in the person

from whom either type of subpoena is requested to require a preliminary showing of "general relevance and reasonable scope of the testimony or other evidence sought." (See present Rule 14(b)(1) [17 CFR 201.14 (b)(1).]

The proper interpretation of both the Rules and the controlling legal authorities was explored at length in a colloquy between Hearing Examiner Ewell and counsel for Petitioner, as we pointed out at pages 18-23 of our Opening Brief.

As will be noted by a reading of the portions of the record that are referred to in those pages of our Opening Brief, immediately following the presentation of this application Hearing Examiner Ewell expressed his tentative views as to the issuance of a subpoena ad testificandum as follows:

- (1) There was no special requirement for issuance, other than an application;
- (2) The application need not be in writing;
- (3) There was no requirement of any showing of relevancy or other qualification;
- (4) Upon application being made, the issuance of the subpoena was mandatory; and
- (5) Since the issue of bias and prejudice was relevant, evidence of it could have been introduced as part of petitioner's case, so it was entitled to the issuance of the subpoena to enable it to produce such evidence.
- (6) The Hearing Examiner preferred to have time to research the point and consider briefs before issuing his ruling.

As we pointed out at pages 24-25 of the Opening Brief, Hearing Examiner James G. Ewell issued on September 10, 1963 his "Ruling and Order on Application for Certain Subpoenas ad Testificandum" (R., pp. 5137-5138), in which the conclusion stated was that the application:

"is hereby GRANTED."

The full text of the pertinent portion of the "Ruling and Order", was the following:

"Now, therefore, upon consideration of the foregoing, the briefs heretofore submitted and the principles set forth in the memorandum and order of the undersigned dated March 15, 1963, aforesaid, indicating that, under the provisions of Rule 14(b)(1)(i) of the Commission's Rules of Practice, *issuance of subpoenas ad testificandum under application of any party is mandatory, the pending application for issuance of subpoenas directed to each member of the Commission and to its Secretary to appear and testify in this proceeding at the instance of counsel for the respondent, is hereby GRANTED; said subpoenas to be made returnable at such time and place as may hereafter be agreed upon by the parties, and*

It is so ORDERED." (R., p. 5138.)

This "Ruling and Order" of the Hearing Examiner, which found in favor of Petitioner's application, and which was in conformity with his tentative views as expressed at the hearing on February 11, 1963 (*supra*, p. 6), was not acceptable to the Division of Trading and Exchanges. It excepted, and the Commission eventually ruled, on February 26, 1964 (R., pp. 5148-5150), that:

"... the ruling of the hearing examiner granting the request of the Exchange for issuance of sub-

poenas ad testificandum be *reversed*, and that such subpoenas not be issued."

The members of the Commission, to whom the Hearing Examiner had ordered that subpoenas should be directed, thus stood exposed as having overruled their own Hearing Examiner, as having ignored pertinent legal authority, and as having refused to allow any one or more of their own members to be questioned openly as to his or their possible bias and prejudice.

It was the very individuals to whom the subpoenas were to be directed who ruled that they, themselves, should not be subpoenaed and questioned as to their own bias and prejudice.

It was this portion of the Opening Brief, setting forth Petitioner's contention that the denial of the application for subpoenas ad testificandum constituted a denial of due process of law, that Respondent has failed to answer at all.

A reading of the Brief for Respondent (especially at pages 19-31) readily discloses that the discussion there set forth relates only to the second, independent application, which was for the subpoena duces tecum addressed to the Commission's secretary, one DuBois. This second and separate application for a subpoena duces tecum was discussed separately in our Opening Brief (at pages 18-24).

III

SINCE THERE WAS NO CHALLENGE OF THE QUALIFICATIONS OF THE HEARING EXAMINER, SECTION 7(a) OF THE ADMINISTRATIVE PROCEDURE ACT WAS NOT APPLICABLE—BUT, EVEN IF IT DID APPLY, THERE WAS A TIMELY FILING OF AN AFFIDAVIT CHARGING BIAS AND PREJUDICE ON THE PART OF THE COMMISSION MEMBERS.

The Respondent Securities and Exchange Commission seeks to default Petitioner on the basis of a technicality, arguing that: “Petitioner Has Not Complied with Section 7(a) of the Administrative Procedure Act” (Br. for Resp., pp. 37-40).

A reading of Section 7(a) is not persuasive. Obviously, its purpose was to require the prompt filing of an affidavit of bias and prejudice on the part of a *hearing officer* or *hearing examiner* who was about to undertake a hearing. The section is couched in the terminology applicable to the duties and functions of hearing officers. There is nothing in the wording of the section itself or in its functional purpose that suggests that it was intended to apply to agency members.

The full text of Section 7(a) is as follows:

“The functions of all *presiding officers* and of *officers participating in decisions* in conformity with section 8 shall be conducted in an impartial manner. *Any such officer* may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of *any such officer*, the agency shall determine the matter as a part of the record and decision in the case.” (Emphasis added).

Furthermore, Petitioner never challenged Hearing Examiner James G. Ewell’s qualifications to conduct the

hearing. That was made clear by counsel for Petitioner when he stated:

“... I certainly did not imply, and trust it was not inferred that there was any accusation levelled at this hearing officer, and I am certain that the record would not support any such accusation.” (R., pp. 1545-6).

In face of the uncontradicted record, with no charge of bias and prejudice on the part of the Hearing Examiner ever having been asserted, reliance by the Respondent upon its claim of non-compliance with Section 7(a) is an empty gesture and an effort to avoid the plain legal consequences of the Commission's refusal to issue subpoenas directed to its own members.

Even if Section 7(a) of the Administrative Procedure Act should be interpreted as being applicable to agency members themselves (that is, the members of the Securities and Exchange Commission), it seems clear that the “Affidavit and Application for Issuance of Subpoena Duces Tecum” as filed with the Hearing Examiner during the session on February 11, 1963 constituted a sufficient and timely compliance with the requirements of that section. This would be true even though the principal purpose of the affidavit was to support the application for the subpoena duces tecum.

The affidavit set forth, among other matters, these statements:

“Said documentary and tangible evidence is relevant and material to a determination, among other things, of the issue as to whether or not the members of the Securities and Exchange Commission *have*

prejudged the issues in these proceedings and are biased and prejudiced against respondent to such an extent as to render them, and each one of them, incompetent to judge said matter fairly, impartially or dispassionately. . . . Affiant is informed and believes, and therefore alleges the fact to be that said members have already formulated and hold the opinion that the registration of the San Francisco Mining Exchange should be terminated; that said opinion on their part is based upon the consideration of evidence and matters not a part of the record in these proceedings.” (R., pp. 4969-4970).

Respondent concedes that a filing of an affidavit of bias and prejudice is timely within the meaning of Section 7(a) when such filing is made “at the first reasonable opportunity after discovery of the facts tending to show disqualification.” (Br. for Resp., pp. 38-39).

In this proceeding, the affidavit that we have referred to was filed on February 11, 1963, while Petitioner was still engaged in the tedious process of attempting to discover the facts. As has been shown, the principal purpose of the affidavit was to support an application for the issuance of a subpoena duces tecum to aid Petitioner in its effort to develop the facts as to bias and prejudice on the part of the Commission members.

At the time that the affidavit was filed and the applications for the issuance of subpoenas submitted, the hearing was still proceeding before the Hearing Examiner. Petitioner (respondent then) had not yet submitted its case, and the matter was not then before the members of the Commission for any purpose—decisional or otherwise.

Petitioner's reason for applying for the issuance of the subpoenas ad testificandum addressed to the Commission members was to enable it to ascertain the factual details upon which it could base in good faith a firm charge of bias and prejudice on the part of one or more of the Commissioners. In addition, the facts so determined could be availed of in support of any affidavits of bias and prejudice that might be required. Certainly these factual details would be pertinent before the members of the Commission could—in the language of Section 7(a)—“determine the matter as a part of the record and decision in the case.”

The ruling of the Commission ordering “that such subpoenas not be issued”, which Petitioner challenges in this proceeding, effectively blocked the effort of Petitioner to establish the facts by discovery. At that point Petitioner had exhausted its administrative remedy, and, if Section 7(a) required the filing of an affidavit of bias and prejudice, certainly the affidavit filed on February 11th was a timely and sufficient compliance with the requirements of that section.

The affidavit and the applications for the issuance of the subpoenas were filed with the Hearing Examiner on February 11, 1963. Counsel for Respondent shortly challenged their timeliness. The Hearing Examiner expressed his view, as follows:

“Hearing Examiner Ewell: I have given some thought to the matter, and while I agree that timeliness is a matter to be considered, I think, as every lawyer knows, the facets of a lawsuit change from hour to hour. *I don't think there is any precise limita-*

tion upon the moment of time at which a subpoena or the desirability of certain testimony or evidence might be deemed essential in the opinion of the counsel for the protection of his client, whoever he may be." (R., p. 2288, emphasis added).

Petitioner submits that, even if Section 7(a) of the Administrative Procedure Act should be interpreted as applying to agency members as well as hearing officers, there was, under the circumstances shown, a compliance with the requirements of the section by the filing in a timely manner of an affidavit charging bias and prejudice with the required sufficiency.

IV

THE EVIDENCE PRESENTED BY PETITIONER ON THE ISSUE OF THE CONTRIBUTION AND VALUABLE SERVICE OF THE MINING EXCHANGE TO THE MINING INDUSTRY AND THE ECONOMY OF THE WESTERN STATES WAS UNCONTRADICTED: IT SUPPORTS THE CONCLUSION AND REMEDY RECOMMENDED BY THE HEARING EXAMINER.

In the Opening Brief for Petitioner, at pages 41-49, we presented the position that the conclusion and remedy recommended by the Hearing Examiner were supported by both the record of the proceedings and the record of performance by the Mining Exchange, and that the order of the Commission should be set aside.

The Brief for Respondent challenges that position (at pages 15-17), arguing that two inconsistent conclusions may be drawn from the same evidence, and that under such circumstances the agency's finding is supported by substantial evidence.

The flaw in Respondent's reasoning is that it offered no evidence whatsoever on the issue of the contribution and valuable service rendered by the San Francisco Mining Exchange to the mining industry and the economy of the western states. Counsel for the Respondent was content to scoff at the evidence presented by Petitioner, expressing his opinion that it was "totally lacking in evidentiary value" (R., pp. 2256, 2266).

As we stated at pages 42-43 of the Opening Brief, the evidence presented by the San Francisco Mining Exchange on this issue was not contradicted or challenged by any showing. Presentations by Philip R. Bradley, Chairman of the State Mining Board of the State of California; by G. Louis Fox, Executive Vice President of the San Francisco Chamber of Commerce; by both George Christopher, Mayor of the City and County of San Francisco and Congressman John F. Shelley; and by Grant Sawyer, Governor of the State of Nevada, were received and admitted as part of the record (see Op. Br., pp. 43-45, and R., pp. 5474-5481).

It was upon the basis of this uncontradicted showing that the Hearing Examiner based the conclusion of his "Recommended Decision" (R., pp. 5483-5484), holding that:

"... The public interest . . . might well be served if the present officials of the Mining Exchange were accorded a further but final opportunity, under the guidance of their counsel, to reorganize the Mining Exchange. . . ."

The evidence on this issue being uncontradicted, the authorities cited by Respondent are not in point. To the

contrary, the eminent justice of the Hearing Examiner's recommendation is demonstrated by the fact that since the filing of the charges, the Mining Exchange has survived four and one-half years of probation of the most severe type, under the closest and most critical scrutiny, without being charged with any additional alleged violations of either statute or rule.

V.

CONCLUSION

The "Order Withdrawing Registration of National Securities Exchange" should be set aside. It should be modified by the entry of an order and judgment providing for a reorganization of the Mining Exchange in accordance with the recommendations of the Hearing Examiner.

Dated: December 23, 1966.

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No. 20,930
United States Court of Appeals
For the Ninth Circuit

SAN FRANCISCO MINING EXCHANGE,		<i>Petitioner,</i>
vs.		
SECURITIES AND EXCHANGE COMMISSION,		<i>Respondent.</i>

PETITION FOR A REHEARING

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No. 20,930

**United States Court of Appeals
For the Ninth Circuit**

SAN FRANCISCO MINING EXCHANGE,

Petitioner,

VS.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A REHEARING

*To the Honorable Frederick G. Hamley, M. Oliver Koelsch
and James M. Browning, Circuit Judges:*

Petitioner San Francisco Mining Exchange hereby files its Petition for a Rehearing in the above-entitled matter, specifically seeking a review of the Opinion filed on May 16, 1967.

I. INTRODUCTORY.

Petitioner would point out that certain conclusions and determinations stated in the Opinion are of an individual nature, peculiar to the facts and conditions of this specific proceeding (as, for instance, the Court's conclusion that, upon the evidence before it, the Commission did not abuse its discretion in the selection of the remedy).

Very much to the contrary, other statements of the law are of broad effect and of general interest, so much so that they will be controlling in many cases and proceedings beyond the limits of this single proceeding. These are the Court's statements interpreting the right of a litigant to obtain a subpoena or a subpoena duces tecum in order to conduct an evidentiary hearing on the issue of bias and prejudice on the part of an agency member.

This subject presents currently one of the major unsolved problems of Federal administrative law upon which the Supreme Court of the United States has not yet ruled.

It is Petitioner's belief that a considered reading of the Court's Opinion can lead one to no conclusion other than that the present Opinion has emasculated completely a litigant's right to obtain such a subpoena, by requiring him to state in a supporting affidavit along with his application those very facts which he is seeking to establish and which he could obtain only with the aid of an evidentiary hearing following the issuance of the subpoena.

If that is to be the rule for this proceeding, then it must also be the law for a myriad of cases to follow.

II. THE COURT RELIED UPON INFERENCE, JUDICIAL NOTICE, AND EVEN SPECULATION IN ORDER TO ESTABLISH "FACTS" SUPPORTING ITS CONCLUSION, WITHOUT ALLOWING PETITIONER THE AID OF A SUBPOENA AND AN EVIDENTIARY HEARING TO ESTABLISH REAL FACTS WHICH WOULD HAVE OUTWEIGHED THOSE "FACTS".

In the first paragraph beginning on page 6 is to be found this revealing disclosure of the judicial process that was used:

"The principal inference which is to be drawn from these excerpts is that the Commission's action in authorizing the administrative proceeding against the Exchange was based at least in part upon its consideration of the staff report." (Emphasis added.)

Yes, "*at least in part*", but what was the other part? Why not allow Petitioner an opportunity to show that? Should not the whole picture and the real truth be established, whatever it may have been?

At any rate, there "*inference*" was relied upon to establish "facts."

Now, "*speculation*" appears! Consider this (second paragraph on page 7):

"It may be that the Commission members, in deciding this case on the merits, made use of the staff report and other information that may have been brought to their attention . . ." (Emphasis added.)

In this connection, it cannot be forgotten that the Commission had ordered the staff report: "*revised in accordance with the Commission's directions.*" (a direct quotation.) If it was revised, then the Commission must have had before it and considered some other information. What was it? Why was it ordered stricken? Was it prejudicial?

However, to go back to the Court's speculative endeavor. Remember the statement of its speculation that:

"It may be that the Commission members, in deciding this case on the merits, made use of the staff report and other information that may have been brought to their attention . . ." (Emphasis added.)

Immediately, there follows this conclusion:

“However, *absent any factual basis for believing* that the Commission made use of these materials, as is the case here . . .” (Emphasis added).

But it was Petitioner’s right to obtain the issuance of a subpoena so that it could conduct an evidentiary hearing to establish those very facts.

By what process, either of a judicial nature or as a matter of trial procedure, may one establish facts without conducting an evidentiary hearing? Seriously, how does a litigant or his counsel, however experienced and adroit, obtain facts for statement in an affidavit without first being allowed to conduct an evidentiary hearing, and being afforded the implements essential to compel the giving, though reluctantly, of vital testimony that establishes those facts?

Proceeding on to a review of the Court’s use of “*judicial notice*” to support its conclusion, we find this significant statement (at the bottom of page 8):

“In any event, the facts stated above, of which *we take judicial notice*, indicate that the prior staff activities of Commissioners Cohen and Woodside were too remote in time and too unrelated in function . . .” (Emphasis added).

A review of the cited portions of the Opinion demonstrates beyond doubt that, in an effort to state a reasoned basis for its ultimate conclusion, the Court has actually engaged in a process of ferreting out and weighing facts, or evidence. In so doing it has relied, demonstrably, upon a collation of inference, judicial notice, and even speculation to establish the “facts.” These are obviously the sources of “*the facts stated above*” (quote from bottom of page 8).

Having established these “facts,” the Court then proceeds to weigh them against the recitals of Petitioner’s counsel’s affidavit. That the Court actually engaged in a process of weighing the evidence (referred to in the

Opinion as "the facts") is clear beyond any possible doubt.

The Court weighed "the facts" based upon inference, judicial notice and speculation (for respondent filed no counter-affidavit or other factual statement) against the statements in the affidavit filed in support of the request for a subpoena to enable Petitioner to establish the real facts which would have overcome inference, judicial notice and speculation.

The Court's conclusion that the subpoenas should not have been issued was based upon its several statements that "the facts" were not stated in the supporting affidavit. In each such instance the facts not so stated were those which Petitioner was endeavoring to establish by an evidentiary hearing.

That this contention is correct is demonstrated by these excerpts from the Opinion:

(1) "If counsel meant to imply that the Commission supervised its preparation, *he alleged no facts in support of such a conclusion.*" (Top of page 7.)

(2) "However, *absent any factual basis* for believing that the Commission made such use of these materials . . ." (Middle of page 7.)

(3) "In the case before us, however, *no such factual allegations were made* by the Exchange . . ." (Bottom of page 10.)

(4) "*There is simply no showing of any such activity* on the part of Commissioners Cohen and Woodside with regard to Exchange's case, *nor is there an adequate factual showing* that any member of the Commission had prejudged the case." (Middle of page 11.)

In each cited instance it is apparent at once that the facts found to be missing from the supporting affidavit were the identical facts which Petitioner had made clear that it sought to establish by the evidentiary hearing which would follow upon the issuance of the requested subpoenas.

III. CONCLUSION: THE BURDEN WHICH THE OPINION IN THIS CASE PLACES UPON A LITIGANT, OF RECITING IN HIS PRELIMINARY SUPPORTING AFFIDAVIT THOSE VERY FACTS WHICH HE IS SEEKING TO ESTABLISH BY USE OF SUBPOENAS AND AN EVIDENTIARY HEARING, DEPRIVES HIM OF DUE PROCESS OF LAW.

Petitioner readily concedes that eventually it would have had to marshal and prove facts that would have outweighed and overcome those which the Court referred to as "the facts above stated, of which we take judicial notice."

This should have been, however, after Petitioner's request for subpoenas had been granted (as was ordered by the Hearing Examiner) and after the conduct of an evidentiary hearing. Only by such procedure could Petitioner have been afforded due process of law.

Both in this proceeding, and in the myriad of cases that will follow, to establish a rule that imposes upon the litigant the burden of stating in a preliminary affidavit, those very facts which he seeks to establish by the issuance and use of the subpoena, is to emasculate the provision for the use of subpoenas, and to deny to the litigant due process of law.

Dated, San Francisco, California,
June 13, 1967.

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CERTIFICATE OF COUNSEL

Pursuant to the provisions of Rule 23 of the Rules of this Court, I hereby certify that, in my judgment, the annexed petition for rehearing is well founded and that it is not interposed for delay.

GARDINER JOHNSON.



No. 20931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARMAND C. FEITCHMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT ARMAND C. FEITCHMEIR.

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FILED

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No. 20931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARMAND C. FEITCHMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT ARMAND C. FEITCHMEIR.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The District Court had jurisdiction under 18 U.S.C. 3231, 62 Stat. 826, this being a proceeding on an indictment [CT 2]¹ in four counts charging this Appellant with violations of section 7201, Internal Revenue Code of 1954 (willful attempt to evade or defeat income tax). In the four counts of the indictment, appellant is charged with violations of the latter statute for the taxable years 1958, 1959, 1960 and 1961, respectively.

¹The Record, pursuant to Rule 10(2) of this Court, is not printed. It consists of the Clerk's Transcript [denominated on the cover page thereof as Transcript of Record and herein referred to as CT . . .]; the major portion of the Reporter's Transcript [herein referred to as RT . . .], and certain designated original exhibits. In Volume II and III there is a duplication of page numbers in the Transcript of Record. In those cases where Volume II is being referred to specific mention will be made.

This is an appeal [CT 145] from a judgment sentencing Appellant to pay a fine in the sum of \$7,500.00 on count two of the indictment and \$7,500.00 on count four of the indictment, upon a verdict of the court, sitting without a jury finding Appellant not guilty on counts one and three of the indictment and guilty on counts two and four [CT 144]. Judgment was rendered and entered on January 10, 1966 [CT 144]. Notice of appeal was filed on January 17, 1966 [CT 145].

This court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and the Rule 37(a), Federal Rules of Criminal Procedure.

Statutes and Constitutional Provisions Involved.

The applicable statutes and constitutional provisions are set forth in the Appendix, *infra*.

Statement of Case.

Armand C. Feichtmeir, the Appellant, during the years 1958, 1959, 1960 and 1961 was primarily engaged in the operation of a general insurance agency known as Armand C. Feichtmeir and Company, a corporation. The Appellant owned substantially all of the stock in the company. In addition, he was the principal shareholder in Pan American Underwriters, Inc. and Pan American Underwriters of Arizona, corporations which were engaged in servicing the group health and accident insurance contracts for agricultural labor in California and Arizona. He had various other investments which consisted of common and preferred stocks, municipal bonds and real estate including an apartment house.

The income reported and the tax paid for the years covered by the indictment are as follows [Ex. 128]:

Year	Income Reported	Tax Paid
1958	\$50,472.53	\$20,509.84
1959	38,522.15	13,661.86
1960	48,188.06	18,494.04
1961	<u>64,126.25</u>	<u>28,612.25</u>
Total	\$201,308.99	\$81,277.99

The Appellant was acquitted on counts one and three covering the years 1958 and 1960, respectively. Concerning the years 1959 and 1961 for which a guilty verdict was entered, the Government claims additional taxable income and tax liabilities thereon as follows:

Year	Additional Unreported Income	Additional Tax Liability
1959	\$95,955.41	\$66,195.76 (RT 382)
1961	31,172.98	20,935.48 (RT 382)

The case was prosecuted under the net worth theory of evidence.

The Appellant exercised his right under the Constitution and did not testify. (See *Slochower v. Board of Education of New York* (1955), 350 U.S. 551, excerpt of opinion set forth below.)²

There was no evidence that the Appellant was engaged in any concealed business or that his reported

²*Slochower v. Board of Education of New York* (1955), 350 U.S. 551, 557, 558; 100 L. ed 692, 700.

The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important

(This footnote is continued on the next page)

businesses were capable of producing more income than was reported on his income tax returns.

Although the prosecution claimed evidence that the Appellant had a net worth in excess of half a million dollars at the close of 1961 and that he was a man engaged in numerous successful business ventures, their evidence of his liabilities indicates only that he had debts *not less than* \$80.56 [Ex. 82; RT 106-107]. The record does not reveal any investigation by the government to determine whether there were any liabilities other than a negligible amount for the one year.

Evidence was produced that there had been gifts to the Appellant and his family from various sources. No attempt was made to follow leads concerning gifts or to determine the amount of the gifts.

During the investigation, agents of the Internal Revenue Service determined that there was a trust. Evidence produced established merely that the Appellant's mother was a beneficiary. Without further clarification as to the source of the corpus of the trust, the

to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as "one of the most valuable prerogatives of the citizen." *Brown v. Walker*, 161 US 591, 610, 40 L ed 819, 825, 16 S Ct 644. We have reaffirmed our faith in this principle recently in *Quinn v. United States*, 349 US 155, 99 L ed 964, 75 S Ct 668. In *Ullmann v. United States*, 350 US 422, 100 L ed 511, 76 S Ct 497, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise *^[558] might *be ensnared by ambiguous circumstances. See *Griswold. The Fifth Amendment Today* (1955).

government included the trust assets in their net worth calculation [Exs. 123, 128; RT 277-280, 343-344].

When the Internal Revenue Agents first contacted the Appellant, during the pre-indictment investigation, they were in possession of an informer's letter concerning the Appellant which had been sent to the Internal Revenue Service. The agents were members of the field audit group commonly known as the "fraud squad" [RT 268-269]. The agents did not advise the Appellant at the initial interview or at any other point in the investigation that he had the right not to talk to them, that anything he said could be used against him, or that he had the right to assistance of counsel [RT 271-272]. At the trial, despite Appellant's objection, evidence was admitted which had been obtained from him by the agents during the pre-indictment investigation or which was derived from the information so obtained by the agents [RT 34, 41-43].

Questions Involved.

1. Did the Government sustain its burden to show that the alleged increases in the Appellant's net worth are attributable to taxable income for the years 1959 and 1961?
2. Did the Government sustain its burden to show a likely source of taxable income which could account for the alleged increases in net worth?
3. Did the Government sustain its burden to show that there was a willfull understatement of income.
4. Was it proper to have admitted evidence which had been obtained without Constitutional advice to the Appellant by Government agents when

they were, under the guise of a civil investigation, acting as a result of an informant's letter; and by reason of information gathered over a period of one and one-half years were fully aware that any evidence solicited from Appellant might tend to incriminate him.

The first three questions were raised in the Appellant's motion for judgment of acquittal made at the close of all the government's evidence [RT 354]. The motion was based in part on the ground that the government's evidence was insufficient under *Holland v. United States* (1954), 348 U.S. 121 and *United States v. Massei* (1958), 355 U.S. 595. The court denied that motion [RT 356]. The motion was renewed on the same ground at the close of all the evidence in the case [RT 365]. The renewed motion was denied [RT 366]. The questions were again raised by the Appellant's written motion for judgment of acquittal notwithstanding verdict of guilty, or in the alternative for a new trial [CT 126]. That motion was also denied by the court [RT 523, 540].

The last question was first raised by a pre-trial motion under Rule 41E, "Federal Rule of Criminal Procedure", for the suppression of evidence, exclusion of statements and return of documents [CT 51; RT Vol. II, 37]. The pre-trial motion was denied by the court without permitting any introduction of evidence on the matter [RT 45]. The question was raised in connection with testimony of Special Agent Keifer into introduction of Exhibits 9 through 33 and 37 through 62 [RT 21, 24 and 25]. The objection was overruled [RT 52].

The question was again raised when the Appellant objected on the same grounds to the introduction into

evidence of Exhibits 63 through 69 and 71 through 81 [RT 56]. That objection was also overruled [RT 57].

The question was again raised by objection to testimony of Revenue Agent Akola concerning his conversation with the Appellant on June 12, 1962 [RT 266]. The court also overruled that objection [RT 272].

Specification of Errors.

1. The District Court erred in denying Appellant's motion for judgment of acquittal after the close of evidence submitted by the Appellee [RT 354-356]. The motion was made on the ground that the Appellee's evidence is insufficient to sustain a conviction of the offenses charged in the indictment [RT 355].

2. The District Court erred in denying Appellant's motion for judgment of acquittal which was renewed after the close of all the evidence in the case [RT 365-366]. The renewed motion was also made on the ground that the evidence is insufficient to sustain a conviction of the offenses charged in the indictment [RT 365].

3. The District Court erred in denying Appellant's motion for judgment of acquittal notwithstanding the verdicts of guilty, or in the alternative for a new trial [CT 126; RT 523, 540]. The motion was made on the grounds that (a) the trial court erred in denying Appellant's motion for acquittal made at the close of the Appellee's case and renewed at the close of all the evidence; (b) the verdicts are not supported by sufficient evidence; (c) the trial court erred in overruling objections to evidence which had been obtained by Appellee in violation of Appellant's constitutional rights [CT 126].

4. The District Court erred in denying Appellant's pre-trial motion for the suppression of evidence, exclusion of statements, and return of documents [CT 51; RT Vol. II, 45]. The motion was made on the grounds that the Appellant's books, records, and other documents were illegally obtained by agents of the Internal Revenue Service in violation of the Appellant's rights under the Fourth, Fifth, and Sixth Amendments to the Constitution, and that the Appellant's statements were illegally obtained by the agents in violation of the Appellant's right under the Fifth and Sixth Amendments of the Constitution [CT 51].

5. The District Court erred in denying Appellant's objection to the admission of Exhibits 9 through 33 and 37 through 62 [RT 21, 24-25, 52]. The objection was made on the grounds that the information contained in the exhibits were illegally obtained from the Appellant by agents of the Internal Revenue Service in violation of the Appellant's rights under the Fourth, Fifth and Sixth Amendments of the Constitution [RT 48].

Summary of Argument.

The Appellant urges two principal points on this appeal. The first is that the Government failed to make a *prima facie* case under the rules governing the net worth method of proof in tax evasion cases. For that reason, the Appellant was entitled to a judgment of acquittal at the close of the Government's case. The second point is that evidence was erroneously admitted which had been obtained from the Appellant in violation of his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution.

The argument concerning the sufficiency of the evidence can be broken down as follows: The requirements

of proof in net worth tax evasion prosecutions require that there be evidence to support an inference that the Appellant's net worth increases are attributable to currently taxable income. The cases hold that evidence supporting that inference must at least show that there was a likely source of unreported taxable income or that all possible sources of non-taxable income have been negated. The Appellant contends that the Government has failed to show either a likely source or that there are no non-taxable sources.

When the Internal Revenue Agent first interviewed the Appellant he was in possession of an informant's letter. He did not advise him of the possible criminal nature of the investigation. Nor did he advise him that he had a right to remain silent as well as the right to the assistance of counsel. As a consequence, this evidence was inadmissible.

ARGUMENT.

The District Court Improperly Equated the Increases in Appellant's Net Worth with Taxable Income.

A. The Government Did Not Prove a Likely Source of Unreported Taxable Income.

The Supreme Court has warned that one of the pitfalls inherent in the use of the net worth method is the possibility that the bare figures will acquire an independent significance of their own apart from the evidence which gave rise to them. *Holland v. United States* (1954), 348 U.S. 121, 127-128.

The assumption that unexplained increases in net worth can be equated with unreported taxable income is unwarranted unless the safeguards set forth in the *Holland* case are scrupulously followed.

"Increases in net worth, standing alone, cannot be assumed to be attributable to *currently taxable income*. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." *Holland, supra*, pages 137-138. (Emphasis supplied.)

In *United States v. Massei*, (1958), 355 U.S. 595, the Court held "... Should all possible sources of non-taxable income be negated, there would be no necessity for proof of a likely source." In so doing, the Court laid down a very narrow exception to the likely source rule. All *possible* sources were not negated in this case. Therefore, the Government was required to show a likely source.

In the *Holland* case (*supra*, p. 137), the Court held that there was a likely source of unreported taxable in-

come which would support an inference that the defendant's net worth increases were attributable to *currently* taxable income because the Government's evidence tended to show that although the defendant's hotel business apparently increased during the indictment years, the reported profits fell to about 25% of the amount declared by former owners in a comparable period; that the cash register tapes, on which the books were based, were destroyed by the defendant; and that the books did not reflect the receipt of money later withdrawn from the cash register for the defendant's personal living expenses and for payments made for restaurant supplies. The Court comments: "Thus there was ample evidence that not all the income from the hotel had been included in its books and records."

The Appellant contends that the Trial Court did not properly apply the rules set forth in the *Holland* case concerning the likely source requirement. This contention is based upon the fact that the Government did not prove an undisclosed business capable of generating taxable income as it did in *United States v. Johnson* (1943), 319 U.S. 503 nor did the Government make any showing that the Appellant's disclosed business was capable of producing more income than it had reported, or that there were any irregularities in the bookkeeping, as was shown in *Holland*.

The record does not even contain the tax returns or any other record of the income of the various corporations, partnerships, and ventures in which the appellant was interested except Exhibits 68 and 69, which specify amounts to be reported for 1960 relating to Industrial Land Corporation and Ellis-Middlefield Associates [Ex. 6]. Appellant's 1960 individual tax re-

turn shows that he reported the income derived from those two entities exactly as Appellant was advised by an independent certified public accounting firm, Arthur Young and Company. Exhibit 69. Thus, the Government has offered no specific evidence to invalidate the income report by any of the various business enterprises. This indicates that it could not prove a likely source.

It is, of course, clear from the *Holland* decision that the purpose for requiring proof of a likely source is that the Court or jury must have substantial evidence to support the *inference* that the net worth increases are attributable to *currently* taxable income. The Appellant admits that the Government is not required to equate every penny of the net worth increase with an identifiable source; but, there must be some *direct evidence* to indicate that the possible source produced more income than was reported.

The Government in this case has not supported the inference connecting the net worth increases with taxable income by any evidence whatsoever except the fact that the Appellant was engaged in business. The Court apparently justifies its decision by making an *inference* that the defendant's businesses, because they did generate some income, as shown by the tax returns, might have generated more. There is nothing in the record which supports the apparent conclusion that the defendant's businesses generated more income than was reported and there is certainly nothing in the record which supports the idea that the defendant had an undisclosed business or income source.

Unlike the *Holland* case in which "... There was ample evidence that not all the income from the hotel had

been included in its business records, . . ." (*supra*, p. 137) the Court has made its inference of a likely source of taxable income without any support whatever. It was error as a matter of law for the Court to support the inference that the net worth increases are attributable to taxable income by spinning out a finding of likely source based on mere conjecture.

The Government contended that there were "many, many opportunities" from which Appellant could have obtained funds. The "opportunities" were nothing more than conjecture on the part of the Government counsel, and there was no evidence whatever to indicate that any action had been taken to realize the "opportunities" by failing to report taxable income from any of the businesses in which Appellant engaged.

In the *Holland* case, the Court carefully laid out the type of proof that was necessary in a net worth prosecution. These safeguards were necessary because the Court "concluded that the method involved something more than the ordinary use of the circumstantial evidence in the usual criminal case," (*Supra*, p. 124). The Court at pages 127-128 and 137 clearly indicates that there must be some substantial evidence to support the inference that the defendant's net worth increases are attributable to *currently* taxable income. It is for this reason that a finding of likely source supported by substantial evidence is required. If the mere fact that a taxpayer is engaged in business activities is sufficient to meet this test, then the requirement of a likely source is meaningless in almost every case involving the owner of a business.

In the recent case of *United States v. Romano* (1965), 382 U.S. 136, 15 L. Ed. 2d 210, the Court

held that it was a violation of the Due Process Clause of the Fifth Amendment for Congress to require an inference of possession, custody and control of an illegal still in violation of 26 U.S.C. §5601(a) from evidence that the defendant was at the site where the illegal still apparatus was set up and that such presence shall be deemed sufficient evidence to authorize conviction. The Court held that such a statutory inference would be struck down if there

“ . . . was no rational connection between the fact proved and the fact presumed, if the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.” P. 139, citing *Tot v. United States* (1943), 319 U.S. 463, 467-468.

This same reasoning is applicable to the inference established by the trial judge that because the defendant was in business which generated reported income, he had failed to report additional income received from his businesses. There is no rational connection between the fact proved, the existence of the businesses, and the fact presumed, the existence of unreported income. The inference attempted by the judge “is so strained as not to have a reasonable relation to the circumstances of life as we know them.”

An additional feature of the case which tends to show that the likely source inferences drawn by the Court are improper is the fact that the Government indicated sev-

eral times that it does not contend that the evidence reveals a likely source which supports the claimed connection between the net worth increase and taxable income. These indications are found in the record as follows:

(1) In the Government's trial memorandum [CT 88, 91] reference is made to the *Massci* case, (1958), 355 U.S. 595, and the rule of law that proof of a likely source is unnecessary if all possible sources of non-taxable income are negated.

(2) On the day before the trial commenced, the trial judge, in open court, inquired of counsel for the Government concerning the theory of their case. The following colloquy took place [RT Vol. II, p. 73]:

"The Court: I read it [*Holland v. United States, supra*] many times and I am not sure that I understand it. But if there is a likely source of income there is no problem, but when we get into the negative features—do you intend to show a likely source of income?

"Mrs. Dunne: In this regard, your Honor, we are presenting essentially all the negative aspects, or proving that there were no gifts or non-taxables, non-taxable sources of income."

(3) One of the Government witnesses, Mr. Ivan Wood, testified that he is secretary-treasurer of San Diego County Farmers, Inc. [RT 156], a farm labor association [RT 167]; that he came into contact with the Appellant concerning insurance for bracero farm labor which was placed by the farmers' organization through the Appellant's insurance agency [RT 167-168]; and that apart from a loan from Appellant's mother [RT

165-166], and an advance to the Appellant in connection with a land purchase [RT 158-159], the witness had no other “personal financial dealings” with the Appellant [RT 168-169].

On cross-examination Mr. Wood testified that the farm association had 850 to 900 member farmers [RT 170], and that the insurance premiums were collected by the association office and paid over to the Appellant’s companies [RT 171-172]. The witness was asked what system of checks or audits were used by the farm association regarding the funds [RT 172]. At that point the Court interrupted and asked if there was any contention that any of these funds went into the personal hands of the Appellant [RT 172]. Counsel for the Government answered “No” [RT 172].

(4) In her closing argument, Government counsel indicated that the Appellant’s corporations properly recorded all their transactions [RT 395, 399 and 406].

Thus the record is not only devoid of any evidence of a specific likely source of unreported taxable income, but the Government denied that certain funds intended for the Appellant’s companies went into his personal hands, and the Government’s closing argument leaves the impression that there was nothing wrong with the books, records and tax returns filed by those companies.

There is a civil case which has striking similarities to the facts in the Appellant’s case. In *Thomas v. Commissioner* (1st Cir. 1956), 232 F. 2d 520, 526, the Court said that the element of likely source is indispensable to proof of the net worth method, even in a civil case. The Government argued that that requirement had been met because “The taxpayer’s corporation

is a possible source of taxable income which could account for the net worth increases. The Court answered this contention as follows:

“We think this argument assumes the very fact to be proved. There must be some independent showing that the corporation might be the source of the unreported income, not merely a negative inference arising from the prior assumption that the increases were taxable and therefore must derive from the corporation since no other taxable source is apparent.

“In *United States v. Johnson* . . . the taxpayer concealed his ownership in various enterprises which were possible sources of the unreported income. In the *Holland* case the business was proven to be capable of producing much more income than was reported and in an amount sufficient to account for net worth increases.

“No such showing has been made in the instant case. The books of the corporation are admittedly consistent. Of course this does not prove they are honest, but in the absence of some independent evidence to the contrary, we believe that respondent has not indicated a likely source of taxable income. There can be no presumption that the books of the corporation are wrong, for any such approach would render entirely nugatory this particular safeguard against abuses of the net worth method.”

In *United States v. Donovan* (D. Va. 1956), 142 F. Supp. 703 a defendant was shown to be in the business of operating a numbers racket, but he kept a complete set of books and records which the Government

could not prove were incorrect. No other possible source was shown. The Government claimed a presumption of falseness because of the nature of the business. The District Court reviewed the decision in the *Thomas* case and stated that the fact that the likely source requirement was strictly applied despite the different burden of proof in a civil case makes the First Circuit interpretation particularly significant. The Court entered a judgment of acquittal notwithstanding the jury's verdict of guilty.

In another net worth case, *United States v. Adonis* (3rd Cir. 1955), 221 F. 2d 717, the court held that evidence offered by the prosecution that the defendant, a government employee, performed services in 1950 for pinball machine operators, was insufficient to show a likely source of taxable income for 1948, the indictment year. Similar evidence for pre-indictment years was held insufficient to show a likely source by the First Circuit in *United States v. Massei, supra*.

B. The Government Did Not Negative Possible Non-Taxable Sources.

The government failed to negative all possible sources of non-taxable income. That defect in the proof, together with the failure to prove a likely source, means that there was no evidence from which it can be inferred that the net worth increases are attributable to *currently* taxable income. Thus, the government did not make the *prima facie* showing required by the *Holland* case and the Appellant was entitled to a judgment of acquittal at the close of the government's case, pursuant to his motion under Rule 29 [RT 354-356].

The issue here is did the Government negative all possible sources of non-taxable income.

There are published opinions³ which hold that where the defendant offers evidence of non-taxable sources and such sources are later disproved, that the Government is not required to negative all other possible sources.

The record does not show that the Appellant offered any evidence of non-taxable sources. Hence, this line of cases is not applicable to the present case.

Another acceptable method of negating possible non-taxable sources of income is for the Government to make a showing of the extensive nature of their investigation in an attempt to uncover possible non-taxable sources of income. In the case of *United States v. Adonis* (3rd Cir. 1955), 221 F. 2d 717 there was no likely source of taxable income, but the Court at page 718 observed as follows:

“* * * The Government proved diligent search for loans, inheritances, gifts and any other potential sources of nontaxable receipts in 1948 which might have supplied the large sums expended by appellant on his home building project. In this connection, although appellant elected to stay away from the investigators who sought to interrogate him about his 1948 income, the investigation covered all appellant had said or was reported to have said from time to time to other people in explana-

³*United States v. Holovachka*, 7th Cir. (1963), 314 F. 2d 345; *Gatling v. Commissioner* (4th Cir. 1961), 286 F. 2d 139; *Commissioner v. Thomas* (1st Cir. 1958), 261 F. 2d 643; *Ferris v. Commissioner* (2nd Cir. 1963), 317 F. 2d 333; *Ehlers v. Final* (D. Nebr. March 29, 1966), F. Supp. _____, 66-1 USTC Para. 9339.

tion of his ability to finance a very expensive 1948 project, so out of line with his apparent circumstances. *This line of evidence was such as to warrant a conclusion by a jury that all reasonable inquiry had been made without discovery of any credible evidence of substantial nontaxable receipts during 1948.*" (Emphasis added).

Also see *United States v. Ford* (2nd Cir., 1956), 237 F. 2d 57, at 59 follows *Adonis*.

At no place in the record can there be found any evidence comparable to that in the *Adonis* and *Ford* cases *supra*, to show the extent of the Government's investigation. The Government's evidence concerning liabilities shows nothing more than the assertion that the minimum amount was \$80.56 [RT 106]. The Court indicated that the amount seemed quite small and that the form of the stipulation did not preclude the showing of additional liabilities [RT 106-107]. The Government at no point introduced any evidence that \$80.56 was the maximum amount of the appellant's liabilities during the indictment years.

Exhibit 128 shows that at the end of the indictment year, the Appellant had a net worth of over half a million dollars and that he was engaged in numerous businesses. It is almost inconceivable that he should have such a negligible amount of liabilities. The possibility that the Appellant had additional liabilities surely must have been apparent to the Revenue Agents during the pre-indictment investigation. The agents were under a duty to follow this "lead". *Merritt v. United States* (5 Cir. 1964), 327 F. 2d 820.

In view of the *Massei* case there should have been an investigation to determine whether there were any

more liabilities. There is nothing in the record to show that the Government agents made any check of the books or brokerage houses where they knew the defendant did business to see if there were any loans which could account for the alleged increase in net worth [RT 275]. Nothing in the record shows that any inquiry was made of other banks, brokerage houses or lending institutions in the community where the defendant resided or was known to have done business to ascertain whether loans could account for the alleged increase in net worth [RT 179, 180, 239, 262]. It is submitted that loans were a possible or even probable source of non-taxable income which have not been negatived by the Government.

The proof concerning the possibility of gifts as a source of non-taxable income was also insufficient. Kirk Mallory, a Government witness, testified that there had been gifts to the appellant's wife from her mother [RT 199, 215]. On cross-examination, Mallory testified that Mrs. Feichtmeir received a gift from another relative [RT 203]. The government introduced no evidence of the total amount of these gifts.

The government did attempt to negative non-taxable sources by asking certain witnesses whether they had made gifts or loans to the Appellant. However, there was no consistency in selecting which witnesses which were to be asked such questions and which were not.

In addition, Helmer S. Akola, a Revenue Agent, testified that during the investigation he was aware of a trust created in 1959, that he examined the tax return for the trust, but he did not attempt to determine if any of the trust assets were included in his computation of defendant's assets [RT 261, 262, 277, 279]. He

also testified that it is possible that trust assets are included in Exhibit 123 which support the net worth statement [RT 280-281]. The trust was certainly a "lead" which was apparent to the agents which should have been followed to negative any non-taxable receipts which could have come from the trust to the defendant.

The issue of what must be the quality of proof for the government to establish a *prima facie* case that "all possible sources" of non-taxable income have been negated is, in reality, academic in this case. At the very least, the government, in its case in chief, must introduce evidence that they have fully investigated and tracked down all the sources of non-taxable income which appear to be probable from the business and financial history of the particular taxpayer. There is a very strong probability that the Appellant had more loans than the minimum amount stipulated. Anyone, such as a revenue agent, with experience in accounting would realize that liabilities in this case should be thoroughly investigated before an accurate net worth statement could be introduced. Yet, there was no investigation shown. The government showed some evidence negating gifts and loans from some business associates, but not others and the Mallory testimony leaves the impression that there may have been additional gifts from the Bennetts. And finally, the 1959 trust was known to the government, but it was never investigated.

There was clearly insufficient evidence of likely source and of the lack of non-taxable sources to support the inference required by the Supreme Court in *Holland* and related cases that the net worth increases are attributable to *currently taxable income*. The Appellant was entitled to a judgment of acquittal pursuant to his

motion after the close of the government's evidence because the government had not made a *prima facie* case. For the same reason there should have been a judgment of acquittal at the close of all the evidence and after the verdict of guilty.

The District Court Erroneously Admitted Evidence Which Had Been Obtained From the Appellant in Violation of His Rights Under the Fourth, Fifth and Sixth Amendments.

In January 1962, during the pre-indictment investigation when the Appellant was first interviewed by an agent of the Internal Revenue Service, the agent was in possession of an informant's letter concerning the tax affairs of the Appellant. [RT 268]. The agent, Helmer S. Akola and his predecessor in the investigation were assigned to Field Audit Group 7, commonly known as the "fraud squad" [RT 269-270]. The agent did not advise the Appellant of his constitutional right not to talk to the agent or to have the assistance of counsel [RT 271]. It is reasonable to assume that when Revenue Agent Akola first approached the taxpayer, he was aware of the fact that he was likely to obtain incriminating information from the Appellant during the ensuing conversations and the inspection of the Appellant's books and records.

Agent Akola at this stage of the investigation was acting under the color of authority of Section 7602, Internal Revenue Code of 1954, the text of which is set out in full in the appendix. The language of this section which grants authority to compel the production of records and to take testimony of a taxpayer,

"is directed solely to the determination and collection of the civil tax liability. Nothing in the statute

specifically authorizes use of the summons in a criminal investigation, and the Code does not contain any general investigative authority from which the necessary authorization could be implied”.

Lipton, “Constitutional Safeguards and Corporate Records,” N.Y.U. Twenty-Third Annual Institute on Federal Taxation, 1315, 1317 (1965).

The Supreme Court has recently indicated that Section 7602 may not be used for the purpose of obtaining evidence for use in a criminal prosecution. *Reisman v. Caplin* (1964), 375 U.S. 440, 449.

Under these circumstances when the agent obtained information and documents from the Appellant without advising him of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution, he was entitled to have all such evidence suppressed from use at the trial, including that evidence which had been derived from the evidence so obtained and not independently from other sources. *Escobedo v. Illinois* (1964), 378 U.S. 478; *Nardone v. United States* (1939), 308 U.S. 338; *Wong Sun v. United States* (1963), 371 U.S. 471.

Within the meaning of the Fifth Amendment, appellant was compelled to incriminate himself during the agent’s investigation because Section 7602 appeared to force him to cooperate. He was not advised of the fact that the agent was a member of the “fraud squad,” that he had information which might incriminate the Appellant and that the additional information to be sought by the agent from his conversations with the Appellant and from the Appellant’s books and records could be used against him in any criminal proceeding. Thus, because of Section 7602, the Appellant’s freedom of action

was restricted in a most significant way. He was, in effect, waiving his rights under the Fourth, Fifth and Sixth Amendments without being aware of the fact that he was in a situation which might call for his exercise of those rights. There was certainly no knowing or intelligent waiver of his rights. *Johnson v. Zerbst* (1938), 304 U.S. 458, 464.

Although the *Escobedo* case, *supra*, concerned an accused person who had been arrested and confined and who had requested the advice of an attorney, the Appellant contends that it is applicable to his situation as outlined above, because, at least for purposes of the Fifth Amendment, the requirement under Section 7602 that he answer all inquiries of the Internal Revenue Agent, is every bit as compulsive as the fact of the arrest in *Escobedo*. The Appellant's freedom to choose whether or not to talk to the agents was extremely limited because he could not have been aware of the possible criminal nature of the investigation and the inapplicability of Section 7602, unless he had at the very minimum been advised of the informant's letter. There were none of the usual trappings of a criminal prosecution. The investigation appeared to be nothing more than a routine tax audit. There was nothing in the character of the investigation to indicate that it could involve criminal penalties.

It is immaterial that he did not request an attorney. Certainly, unless he was advised of his constitutional rights there would be no reason for him to suspect that he needed an attorney, because it did not appear to be anything but a routine tax audit. Furthermore, the Supreme Court has clearly held that a right to counsel does not depend on a request for counsel and the waiver

of a right to counsel will not be presumed from a silent record. *Carnley v. Cochran* (1962), 369 U.S. 506.

The Appellant is aware of the opinion of this Court in *Kohatsu v. United States* (9 Cir. 1966), 351 F. 2d 898, cert. den. (June 20, 1966). However, the existence of the informer in the Appellant's case clearly distinguishes it from *Kohatsu*. The Agents were quite aware from the beginning that they were likely to obtain incriminating information from the Appellant.

The District Court erroneously applied the standards of the *Escobedo* and *Carnley* cases when it denied the Appellant's written pre-trial motion, and again when he overruled the Appellant's objection to the introduction of evidence which appeared to have been derived from such evidence. The District Court again overruled a similar objection to the testimony of Revenue Agent Akola concerning his conversation with the Appellant on June 12, 1962.

The Government Did Not Make a Prima Facie Case on the Issue of Willfulness.

One of the required elements of the crime charged in the indictment is willfulness. In this context that term means bad purpose and evil motive and an act done with the specific intent to accomplish that which the law forbids. *United States v. Murdock* (1933), 290 U.S. 389, 394-395.

The Appellant contends that the record is not sufficient to show that he had either bad purpose, evil mo-

tive, or any specific intent to violate the Internal Revenue Laws.

If there was not sufficient evidence that Appellant's net worth increases can be attributed to taxable income, the Appellant was entitled to an acquittal on that ground alone and there is no necessity to find willfulness in a record which doesn't show there was any unreported taxable income.

Conclusion.

This Court should reverse the Appellant's verdict of guilty on Counts Two and Four of the indictment and remand the case with instructions to acquit the Appellant on both counts. This Court may, in its discretion, reverse the judgment of the District Court and order an acquittal.⁴

In this case, Appellant contends that it is abundantly clear that the government's proof was substantially lacking in the evidence required to make a *prima facie* case. Under the circumstances, the Appellant was entitled to a judgment of acquittal at the time he made his motion under Rule 29 at the close of all the evidence in the government's case. This brief has shown that there is a great deficiency in the government's proof relating to likely sources of unreported taxable income and the non-taxable sources. It is highly im-

⁴See 28 U.S.C. Section 2106, 62 Stat. 963; compare *Bryon v. United States* (1950), 338 U.S. 552 with *Sapir v. United States* (1955), 348 U.S. 373; *Forman v. United States* (1960), 361 U.S. 416.

probable that these matters were overlooked by Government counsel. The Government's trial memorandum and the colloquy which occurred between the Court and Government counsel, on the day prior to trial, show that the Government was well aware of these required elements of its case. A direction of acquittal under similar circumstances was made in *Karn v. United States* (9th Cir. 1946), 158 F. 2d 568; *United States v. Bozza*, (3rd Cir. 1946), 155 F. 2d 592; *United States v. Renee Ice Cream Co.*, (3rd Cir. 1947), 160 F. 2d 353 and *United States v. Gardner* (7th Cir. 1948), 171 F. 2d 753.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ALVA C. BAIRD

APPENDIX A.

Statutes and Constitutional Provisions.

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954

26 U. S. C. A. (1955 ed.)

§7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000.

or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary, or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

APPENDIX B.

Statutes and Constitutional Provisions.

United States Constitution

Amendment VI

Jury Trial for Crimes, and

Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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N O. 2 0 9 3 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMAND C. FEICHTMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

OCT 23 1966

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NO. 20931
IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT
OF THE CASE

This is an appeal from a judgment of conviction on two counts of a four-count indictment which was returned by the Federal Grand Jury for the Southern District of California on April 4, 1965 [C. T. 2-6]. ^{1/}

Counts One, Two, Three and Four charged a violation of Title 26, United States Code, Section 7201, Willful Attempt to Evade and Defeat Income Tax for the years 1958, 1959, 1960 and 1961, respectively.

^{1/} C. T. refers to Clerk's Transcript.

On December 6, 1965, a hearing was held on appellant's motion to suppress evidence and motion to dismiss the indictment. Both motions were denied [R. T. Vol. C, p. 45]. ^{2/}

On December 7, 1965, a court trial was commenced. Trial by jury having been waived. On December 10, 1965, the appellant was acquitted on Counts One and Three, and convicted on Counts Two and Four by the Honorable Charles H. Carr, United States District Court Judge [R. T. 512-513].

On January 10, 1966, the appellant, Armand C. Feichtmeir, was sentenced to pay a fine in the sum of \$7,500.00 on each of Counts Two and Four [C. T. 144].

On January 10, 1966, appellant filed a notice of appeal [C. T. 145].

The jurisdiction of the District Court was predicated on Title 26, United States Code, Section 7201, and this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 26, United States Code, Section 7201, provides in pertinent part:

"Any person who wilfully attempts in any

^{2/} R. T. refers to Reporter's Transcript.

manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof shall be fined not more than \$10,000 or imprisoned not more than five years, or both, together with the cost of prosecution."

III

STATEMENT OF FACTS

A. Method of Proof and Computation of Corrected Tax Liability.

Appellee proceeded to trial on the net worth method. This method computes income by measuring the increase between two points in time of a man's assets minus liabilities. To this increase is added any expenditures which would not be reflected in either the acquisition of assets or reduction of liabilities. In addition, the government negated the possibility that non-taxable funds were the source of appellant's unreported net worth, thus logically concluding that the net worth increases were derived from some taxable source.

The years covered by the indictment were 1958 through 1961. The government started its net worth computation as of December 31, 1950.

The evidence established appellant's net worth as follows:

YEAR ENDINGNET WORTH

12/31/50	-	\$ 24,585.54
12/31/51	-	27,991.85
12/31/52	-	42,661.77
12/31/53	-	99,069.22
12/31/54	-	131,270.40
12/31/55	-	120,560.55
12/31/56	-	132,316.25
12/31/57	-	266,470.58
12/31/58	-	268,294.47
12/31/59	-	396,153.45
12/31/60	-	461,780.82
12/31/61	-	513,955.50

Based on the testimony and evidence, the Government proved the following computations of appellant's corrected income and corrected tax liability for the indictment years.

1958

	<u>PER RETURN</u>	<u>CORRECTED</u>
Taxable Income	\$50,472.53	\$58,962.10
Income Tax Liability	20,509.84	25,727.55

1959

Taxable Income	38,522.15	134,477.56
Income Tax Liability	13,661.86	79,857.62

	<u>1960</u>	
Taxable Income	48,188.06	57,501.91
Income Tax Liability	18,494.04	23,410.77
	<u>1961</u>	
Taxable Income	64,126.25	95,299.23
Income Tax Liability	28,612.25	49,547.73

B. Appellant's Business Interests.

In 1950, the appellant was an insurance agent and broker operating the Armand C. Feichtmeir Agency, a sole proprietorship [R. T. 176-177].

In 1951, appellant introduced a non-occupational insurance policy for bracero and agriculture laborers. This program expanded and by 1961 appellant insured all but two growers in the State of California [R. T. 179-180]. Concurrently appellant's business interests expanded and in May, 1954, appellant incorporated his initial business under the name Armand C. Feichtmeir and Company. Appellant was President and owned controlling stock interest.

a. Fuller Commissary Company was incorporated in 1956. A majority of its stock was owned by Armand C. Feichtmeir and Company. Fuller Commissary operated a camp for farm laborers in San Diego County. In 1960, Fuller Commissary changed its name to San Luis Rey Properties [R. T. 156-157].

b. Maps, Incorporated, was organized in 1953. The

majority of its stock was owned by appellant's family. From 1953 to 1956, Maps engaged in the business of housing and feeding farm laborers in Blythe, California. In 1956, appellant's family acquired total ownership of the stock and the corporation became inactive until approximately 1959 [R. T. 151-154].

c. Mission Acres is a partnership formed in 1959 by Fuller Commissary (San Luis Rey Properties) and Maps, Incorporated. Mission Acres was formed to purchase unimproved land [R. T. 157-158].

Pan American Underwriters, Incorporated, was incorporated in September, 1955; appellant was president and owned controlling stock interest. Pan American Underwriters was a derivative of the sole proprietorship Armand C. Feichtmeir and Company. Pan American Underwriters engaged exclusively as an insurance agency handling health and accident insurance for agricultural laborers.

a. Rancho Armando was a ranch in Imperial Valley. In December, 1961, Rancho Armando was incorporated and all of the stock was owned by Pan American Underwriters, Incorporated.

Pan American Underwriters of Arizona was incorporated in 1959 in Arizona. Pan American Underwriters of Arizona was an insurance agency handling health and accident insurance for agricultural laborers [R. T. 88].

Spa Limited was appellant's sole proprietorship created in 1953. Spa Limited operated as a lending institution on chattel mortgages and was actively so engaged from its inception until 1961 [R. T. 88-89].

P. A. F. was a shell corporation which maintained a commercial checking account from 1957 through 1959 in which the appellant deposited his personal funds [Exhibits 91-94].

C. Other Investments

On September 3, 1959, appellant purchased an apartment house in Beverly Hills with a \$60,350.00 deposit in escrow, \$40,350.00 from the bank account maintained by P. A. F. an inactive corporation; and \$20,000.00 comprised of four cashier's checks, each in the amount of \$5,000.00 purchased on four consecutive days at four different banks with currency [Exhibits 13-17, 92].

In 1960, appellant invested over \$40,000.00 in Ellis Middlefield Associates, a joint venture engaged in land development in northern California. In 1961, appellant increased his investment by \$25,000.00. This sum of money was comprised of five cashier's checks for \$5,000.00 each, purchased at five different banks on the same date. The applications therefor show that four of said cashier's checks were purchased with currency [Exhibits 71-75].

In December, 1961, appellant paid \$35,000.00 for a half interest in a trust deed on property known as the Kobayshi Ranch, Westmoreland, California [Exhibits 45-48].

Commencing in 1957, appellant began buying municipal bonds and as of December 31, 1961, his investment in municipal bonds totaled \$100,589.51 [Exhibits 100-108, 126].

Corresponding with appellant's increases in his net worth

were his investments in stocks other than his closely-held businesses. His investments increased in value from \$1,786.60 as of December 31, 1950 to \$93,775.81 as of December 31, 1961 [Exhibits 100, 102-108, 110, 113-115, 117, 122-123, 128]. This evidence was produced from eight separate brokerage firms and seven transfer agents.

Appellant's funds on deposit started at \$3.42 on December 31, 1950, and increased to \$19,320.31 as of December 31, 1961. In tracing appellant's financial history, the evidence concerns seventeen separate banks or branches throughout California, in San Antonio, Texas, and in Mexico City [Exhibits 13, 14-17, 41, 62-63, 71-75, 77-79, 83, 88, 91, 95, 97, 82, 101]. Illustrative of the exhaustive investigation are Exhibits 100 and 101. Hill Richards brokerage firm recorded the serial numbers of currency used by appellant for several of his stock purchases. The Government was able to trace \$5,500.00 of this currency to its inception, thereby establishing that on April 12, 1957, January 3, 1958, and September 5, 1958, specified new \$100.00 notes were issued by the San Antonio Federal Reserve Bank to the Frost National Bank in San Antonio, Texas; the Frost National Bank transferred the money to the Banco Nacional in Mexico City, and within a matter of months of each transaction this money was being spent by the appellant.

As part of the evidence of appellant's non-deductible expenditures, documents were produced from 17 third-party businesses [Exhibit 98].

Perhaps the clearest indication of appellant's financial growth is that in the early 1950s, appellant was a borrower. That is, in order to purchase a \$34,000 home and an automobile he had to seek financing [Exhibits 26, 109, 128]. On the other hand as of December 31, 1961, appellant was a lender in the sum of \$80,907.86 [Exhibits 49, 57-60, 62].

D. Trust

Appellant's mother was the beneficiary of a trust. Stocks which were part of the trust's assets in 1961, were included in the government's net-worth computation as appellant's assets [Exhibit 128, common and preferred stock other than closely held corporation]. All of such stocks were traced to purchases by appellant from his own private or personal funds with the exception of \$499.22 [R. T. 662-670, Exhibits 100, 102-108, 110-122].

Additionally, appellant reported capital gain transactions for trust stock on his 1961 income tax return [Exhibit 7]. Since said stocks originated in appellant's personal funds they are properly includable in the government's net-worth computation as either an asset or a non-deductible expenditure (gift). Regardless of the designation the effect is the same.

E. Non-Taxable Sources

The government's meticulous investigation negated the

possibility that non-taxable funds such as loans, gifts or inheritances, accounted for appellant's unreported net worth increase of \$144,000. During the indictment years, appellant received no gifts or inheritances. Appellant's only loan was for the purchase of the apartment house in 1959.

The families of appellant and his wife were traced.

Bennett was the maiden name of appellant's wife, Peggee Feichtmeir. Mr. and Mrs. Bennett gave the following gifts to Peggee Feichtmeir: 50 shares of AT&T in June of 1947 [Exhibit 110]; \$5,000 in 1944; \$5,000 in 1945; and \$10,000 in the late 1940's [R. T. 200, 213-215].

In 1950 Mr. Bennett died. He left no estate having transferred his assets to Mrs. Bennett prior to death.

The only inheritance received by Peggee Feichtmeir was \$3,000.00 from an aunt in 1948 [R. T. 204].

Since 1950 the surviving members of the Bennett family consisted of Mrs. Bennett and her two daughters, Peggee Feichtmeir and Mrs. Kirk Mallory [R. T. 201]. At the time of trial Mrs. Bennett was 96 years old [R. T. 217]. In 1959 all of Mrs. Bennett's assets were placed in a trust and her son-in-law, Kirk Mallory, was sole trustee. Since 1959 Mrs. Bennett's gifts were a Christmas or birthday gift of a nominal value [R. T. 198-199].

Kirk Mallory testified that he and his wife had never loaned money to the appellant's family. The Mallorys had never borrowed money from the appellant's family. The Mallorys had never engaged in any business with the appellant's family [R. T. 202].

In appellant's family there were no gifts or loans to appellant [R. T. 183-189, 193]. To the contrary, appellant loaned money to both of his brothers, part of which appellant wrote off as an uncollectible bad debt [R. T. 182, 192].

Appellant's father died in January, 1940, leaving no estate [R. T. 185-186]. The only inheritance received by appellant was \$190.00 from an uncle in 1950 [R. T. 186, 193].

From 1951 to the time of trial the surviving members of the Feichtmeir family consisted of appellant's mother and two brothers [R. T. 185]. During the indictment period appellant supported his mother [R. T. 190, 193-194].

Thus, the evidence established that from 1940 to 1950 appellant and his wife received over \$20,000.00 and 50 shares of American Telephone and Telegraph constituting non-taxable funds. The stock is contained in the Government's net worth computation [R. T. 352]. To the extent that the money was converted into assets, expenditures or reduction of liabilities, it would also be reflected [R. T. 351].

The possibility that this non-taxable sum was a reserve available in the indictment period was completely negated by the Government's proof that from 1950 to 1958, appellant expended over \$98,000.00 more than reported funds available. It should also be noted that appellant never claimed that he saved or accumulated these funds.

F. Wilfullness

The record is replete with evidence of wilfulness and intent. The pattern of understatement and the substantiality of evaded tax are indicia of intent. As an example, appellant evaded over 80% of his correct tax liability for 1959.

During the indictment period, appellant's currency transactions totaled \$194, 725. 56 which was significantly comparable to his unreported income. Appellant's salary checks and bank accounts are not the source of this currency. There are no non-taxable sources. The currency was received in the same year it was expended by appellant. It is logical to conclude that the currency was generated by undisclosed business interests. This fact is corroborated by appellant's efforts to avoid detection of the currency. For example, in August, 1959, appellant purchased four cashier's checks, each in the amount of \$5, 000. 00. He purchased each check with currency at four different banks on four consecutive days [Exhibit 14-17]. On another occasion, appellant purchased five cashier's checks each in the amount of \$5, 000. 00; these checks were all purchased on the same day at five different banks. Four were purchased with currency and the application for the fifth check does not identify the funds used [Exhibits 71-75]. Another device utilized by the appellant was a bank account in the name of P. A. F. P. A. F. was a shell corporation, having no assets or business function. Large sums of cash were deposited to the P. A. F. account and used for personal expenditures by appellant [Exhibit 92].

Consciousness of guilt is also shown by his statement to the Revenue Agent and the "funds statement" given to the Special Agent [R. T. 274, 30-31]. In both instances, he deliberately attempted to mislead the agents by claiming accumulated cash was the source of his expenditures. As the evidence established there was no unexpended cash accumulation.

From these facts one can conclude that appellant intended to evade the payment of taxes.

IV

ARGUMENT

A. THE DISTRICT COURT PROPERLY
CONCLUDED THAT APPELLANT'S
UNREPORTED NET WORTH IN-
CREASE WAS TAXABLE INCOME.

1. The Government Satisfies Its
Burden When It Disproves the
Existence Of a Claimed Non-
Taxable Source.

The crux of this appeal is the propriety of equating the unreported net worth increase with unreported taxable income. Holland v. United States, 348 U.S. 121 (1954), a leading case on the net worth method, indicates that a net worth case is vulnerable in its accuracy of computations, yearly allocation of increase, and inference of taxability. In the instant case appellant stipulated to substantially all of the items comprising his net worth. Although this impedes demonstrating the meticulous nature of the

Government's investigation, it clearly establishes the accuracy of the Government's computations as well as proper yearly allocation. To support the inference of taxability, the Holland case, supra, states that proof of a "likely source" was sufficient.

Subsequently in Massei v. United States, 353 U. S. 593 (1958), the Supreme Court determined that absence of non-taxable sources rationally supported the inference of taxability.

On the quantum of proof required to negate non-taxable sources, it is the Government's premise that in claiming one non-taxable source, the appellant has refuted the other non-taxable sources, and therefore the Government has met its burden of proof when it establishes beyond a reasonable doubt the falsity of appellant's claim. Throughout the investigation, appellant claimed personally and through his counsel, that his unreported net worth increases were the result of accumulated prior earnings.

On June 12, 1962, a Revenue Agent questioned appellant about the source of his currency expenditures. Appellant explained that he had accumulated currency by withdrawing \$500 a month from his commercial account at the main branch of the Bank of America in Los Angeles [R. T. 274]. The Government completely refuted this explanation by showing that during the eleven year period from January 1, 1951 through 1961, the appellant made only twelve withdrawals in the sum of \$500 for a total of \$6,000 [Exhibit 84]. Then the Government proved that appellant's currency expenditures were over \$90,000 for 1957 [Exhibits 85, 94, 97, 99, 100, 103, 104]; over \$20,000 for 1958 [Exhibits 85, 100]; over \$100,000

for 1959 [Exhibits 14-17, 63, 85, 100]; over \$19,000 for 1960 [Exhibits 80, 96, 105]; and over \$43,000 for 1961 [Exhibits 61, 62, 72-75]. Comparing the \$6,000.00 cash withdrawn to the \$272,000.00 cash expended, it is clear that appellant's explanation of cash accumulated from prior years is false.

In April of 1963, appellant again offered an explanation for his expenditures. At this time the investigation was being conducted by a special agent or criminal investigator and the appellant had retained an attorney to represent him for the investigation. The special agent was given a "funds statement" to establish that appellant's accumulated funds from prior reported earnings constituted a cash reserve which was the source of his later expenditures [Exhibit 81, Report R. T. 30-31]. An accountant prepared the "funds statement" from appellant's available records and information supplied by appellant [R. T. 130-136]. Certainly under these circumstances, any false statement so carefully prepared can only be construed as a wilful misrepresentation by appellant calculated to deceive the agents. In the "funds statement" appellant claimed that for 1953 through 1957 he had, at different times, cash reserves which totaled over \$60,000. These reserves were allegedly derived from available reported income. To negate this explanation, the Government established that during the seven year period preceding the first indictment year, appellant expended over \$98,000 more than available funds as reported [Exhibit 128].

Utilizing 1957 as an example, appellant claimed in his "funds statement" that he had a cash reserve at the beginning of the year

of over \$28,000, and that he received over \$72,000 during 1957, for a total of over \$100,000. Appellant then claimed that he dispersed over \$91,000 during 1957, resulting in a cash reserve at the end of the year of over \$9,000.

It is interesting that appellant admits receiving \$72,943.11 during the calendar year 1957, whereas on his income tax return for 1957, he reported an income of \$48,580.16. Of course it was necessary to admit greater earnings in pre-indictment years in order to result in the cash savings claimed. The most telling fact is that the Government proved that in 1957, appellant dispersed or expended over \$165,000, rather than the \$91,000 alleged by appellant [Exhibits 3, 94, 99, 128]. Thus clearly appellant's carefully contrived explanation of cash savings was false.

"Where taxpayer has committed himself to one specific explanation of the source of funds expended, the Government should not be required to waste time and resources in futilely attempting to negate possible non-taxable sources which have, in effect, been denied by taxpayer's claim of a particular source." Gatling v. C. I. R., 286 F.2d 139, 144 (4th Cir. 1961).

"It is well settled, however, that the commissioner may in proceedings such as these are, prove a source of taxable income or disprove the existence of alleged sources of non-taxable funds. Whereas here, the taxpayer advances as a defense one claim of a

non-taxable source, that claim negates other possible non-taxable sources and the commissioner satisfies his burden when he disproves the existence of the claimed source." Ferris v. C. I. R., 317 F.2d 333 (2nd Cir. 1963). See also Commissioner of Internal Revenue v. Thomas, 261 F.2d 643 (6th Cir. 1958).

These decisions were civil net worth tax cases. However, in a criminal tax evasion case, ". . . the prosecution makes out a sufficient case to go to the jury, if the evidence would have been enough in a civil action; the only difference between the two is that in the end the evidence must satisfy the jury beyond any reasonable doubt." United States v. Costello, 221 F.2d 668, 671 (2nd Cir. 1955).

Several criminal net worth tax cases have also determined what is sufficient negation of non-taxable sources in the absence of a likely source. They have held that the taxpayers' wilful misrepresentation of non-taxable receipts logically infers an effort to conceal unreported taxable income during the indictment years from some source.

United States v. Holovachka, 314 F.2d 345

(7th Cir. 1963);

United States v. Ford, 237 F.2d 57 (2nd Cir. 1956);

United States v. Adonis, 221 F.2d 717

(3rd Cir. 1955).

The burden of proof rests upon the Government but it has met its burden and established a prima facie case when it negates

the non-taxable source claimed by appellant. Information as to the existence of non-taxable sources is peculiarly within the knowledge of appellant and could easily have been presented by him. He contends nevertheless that the possible existence of non-taxable sources creates a fatal defect in the Government's case. The Supreme Court has stated, however, that "the general rule . . . is that it is not incumbent . . . on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could readily be disproved by the production of documents or other evidence probably within the defendant's possession or control." Rossi v. United States, 289 U.S. 89, 91-92 (1933) and cases cited, VIII Wigmore, Evidence (3rd Ed. 1949), Section 2273; II Id. Sections 285-291. Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased, if it may draw an inference of guilt from the unexplained possession of contraband narcotics, it may also give weight to the failure of an accused taxpayer to produce evidence of the value of assets which allegedly would deprive the Government's case of substance.

Wilson v. United States, 162 U.S. 613 (1896);

Yee Hem v. United States, 268 U.S. 178 (1925).

The force of a prima facie case may not be defeated by "skillful concealment" (United States v. Johnson, 319 U.S. 503 (1943)), or by mere conjecture or speculation as to the possible existence of undisclosed assets.

2. Appellee Negated All Possible
Sources Of Non-Taxable Income.

Section 63 of Title 26, United States Code defines taxable income as gross income minus deductions.

Section 61 of Title 26, United States Code defines gross income as all income from whatever source derived.

Sections 101 through 121 of Title 26, United States Code set forth those items excluded from gross income. An examination thereof shows that only three sections have any application to the instant case. In computing unreported taxable income, the Government excluded dividends received as provided in Section 116 of Title 26, United States Code and also tax exempt interest as provided in Section 103 of Title 26, United States Code [Exhibit 128]. Section 102 of Title 26, United States Code provides that gross income does not include gifts, bequests, devises or inheritances. As described in the Statement of Facts, the Government conducted an exhaustive investigation of appellant and his family. The results established no gifts or inheritances during the indictment years. From 1940 to 1950 appellant and his wife received some gifts and inheritances of stock and money. The stock is contained in the Government's net worth computation [R. T. 352]. To the extent that the money was converted into assets, expenditures, or

reduction of liabilities, it would also be reflected [R. T. 351]. The possibility that some \$20,000 in gifts or in inheritances constituted a cash accumulation, on hand during the indictment period, was completely negated by the Government's proof that from 1950 to 1958, appellant expended over \$98,000 more than available funds as reported [Exhibit 128].

Thus, it is submitted that in the instant case appellee has negated all possible sources of non-taxable income.

3. The Appellee Produced Evidence Of Likely Source.

" . . . it is well established that the Government need not prove the specific source of proved increases in net worth in order to demonstrate their tax character as income; it is sufficient for it to prove a 'likely source' from which the jury could reasonably find that the net worth increase sprang."

United States v. Sclafani, 265 F.2d 408, 413

(2nd Cir. 1959);

Holland v. United States, 348 U.S. 121;

Armstrong v. United States, 327 F.2d 189

(9th Cir. 1964).

In this case, the Government established that during the indictment period appellant had interests in eight operating

businesses plus investments in real estate, trust deed, joint venture and stocks and bonds. As part of the evidence it was also shown that appellant was receiving money from Mexico indicating an undisclosed Mexican business source [Exhibits 100-101]. Books and records were maintained only for the corporations. Appellant did not keep a personal set of books for his other businesses or investments [R. T. 66-67].

Admittedly, the Government did not detect any specific false entries in the corporate records, however, the existence of other income producing businesses and investments for which the appellant maintained no books would seem to establish a likely source. The Court could thus conclude on the basis of the entire evidence that appellant's new affluence during the prosecution years must have come from these businesses and investments and therefore was income unreported on his tax returns. Barsky v. United States, 339 F.2d 180 (9th Cir. 1964).

B. CONSTITUTIONAL RIGHTS OF THE
APPELLANT WERE NOT VIOLATED
WHEN HE VOLUNTARILY MADE
STATEMENTS TO A REVENUE AGENT.

On June 12, 1962, in appellant's office, he and his accountant met with Revenue Agent Akola. The Revenue Agent did not advise appellant of the right to remain silent under the Fifth Amendment or of a right to counsel. During this meeting appellant made false statements concerning the source of his expenditures. Appellant

contends that these statements were obtained in violation of the Fourth, Fifth and Sixth Amendments and should not have been admitted into evidence. The Government submits that this issue is controlled by Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), cert. den. 384 U.S. 1011.

"We find nothing in the Escobedo opinion or its 'philosophy' which would impose this duty [to inform a taxpayer of the criminal nature of the investigation and his right to remain silent], upon Revenue Agents during their investigation of a taxpayers' tax returns and records."

Kahatsu v. United States, supra;

See also:

Rickey v. United States, 360 F.2d 32 (9th Cir. 1966);

United States v. Spomar, 339 F.2d 941

(7th Cir. 1964).

Appellant seeks to distinguish Kahatsu by relying on Section 7602 of Title 26, United States Code, and the existence of an informant's letter.

The Revenue Agent did not compel the appellant to appear, produce records, or give testimony. The provisions of Section 7602 of Title 26, were not used and it is inapplicable. Smith v. United States, 250 F. Supp. 803 (D.C. New Jersey 1966).

The existence of an informant's letter is immaterial. The examination was being handled by a Revenue Agent whose duties concerned tax liability from a civil aspect. A special agent or

criminal investigator had not been assigned or even consulted [R. T. 267]. When the matter was subsequently referred to the Intelligence Division appellant secured the representation of counsel. The appellant, through his counsel, continued to cooperate and supply additional information.

In the specification of errors, appellant cites the admission of exhibits obtained from the appellant by the special agent as error. He presents no argument on this point. These records were obtained with the permission of appellant's counsel [R. T. 28-30]. There was no violation of any of appellant's constitutional rights.

V

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 20931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARMAND C. FEICHTMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Central District of California.

APPELLANT'S REPLY BRIEF.

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Central District of California.

APPELLANT'S REPLY BRIEF.

Statement.

The Appellee's brief makes five principal points to support its conclusion that the evidence supports the verdict. These points are:

- (1) The Appellee established an increase in net worth which was not from non-taxable sources.
- (2) The Appellee negated all possible sources of non-taxable income.
- (3) The Appellee produced evidence of a likely source of taxable income.
- (4) The Appellee established willfulness to defeat and evade income tax.
- (5) The Appellee did not violate the Constitutional Rights of the Appellant.

The Appellant's contentions are:

- (1) The Appellee has not established an increase in net worth from taxable sources.

- (2) The Appellee has not negated all possible sources of non-taxable income.
- (3) The Appellee has not produced evidence of a likely source of taxable income.
- (4) The Appellee has not established willfulness to defeat and evade income tax.
- (5) The Appellee did violate the Constitutional Rights of the Appellant.

Appellee's brief (p. 3) states: "The evidence established Appellant's net worth as follows: . . .". A schedule of the net worth is there set forth.

All that the evidence did was to establish the Government's *computation* of the Appellant's net worth as of the end of each year. The Government's computations are fraught with mistakes including errors in copying and arithmetic (Appx. C).

Appellee's brief, page 4, also states the Government "proved" computations of Appellant's corrected income and corrected tax liability for the indictment years 1958, 1959, 1960 and 1961. The Government did no more than introduce evidence of its computations of alleged corrected income and corrected tax liability. In fact, the Appellant was acquitted of the charge made in the indictment with reference to the years 1958 and 1960.

Such loose generalized statements and others throughout the Appellee's brief ignore the all inclusive issue to wit: Has it been established beyond a reasonable doubt that there was a willful omission of *taxable income* in the years 1959 and 1961.

"Increases in net worth, standing alone cannot be assumed to be attributable to currently taxable income."

Holland v. United States, 348 U.S. 121, 136 (1954).

ARGUMENT.

I.

The Appellee Has Not Established an Increase in Net Worth Which Was From Taxable Sources.

The items of assets and liabilities computed by the Appellee are set forth in Exhibits 82, 127 and 128. A considerable number of the items are stipulated, however, the Appellant did not and has not stipulated to the accuracy and completeness of the computations of the accumulations of currency and the cost of non-taxable municipal bonds and common stocks owned by the Appellant at the various dates. Discussion of this is contained in the record [R. T. 102-107]. (Appx. A, attached hereto).

In addition, the stipulation concerning the net worth schedule [Ex. 82, R. T. 102-107], leaves open the possibility that prior to the indictment years the Appellant had additional assets in the form of accumulations of currency, municipal bonds, and common preferred stocks and additional liabilities [R. T. 104-107].

There was no testimony that there were no assets or liabilities other than those shown on Exhibit 82.

“The essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of the guilt beyond all reasonable doubt.”

United States v. Fenwick (7th Cir., 1949), 177 F. 2d 488, 492 [5-7].

II.

The Appellee Has Not Negated All Possible Sources of Non-Taxable Income.

On page 1 of Appellee's brief, under the heading "Topical Index", it states:

1. The Government satisfies its burden when it disproves the existence of a claimed non-taxable source.

This statement is not applicable, to this case for the reason that the Appellant did not claim a non-taxable source to the exclusion of all other sources. The Appellant did nothing more than make some extra-judicial statements indicating where and how certain currency had been secured for certain expenditures.

In sub-paragraphs 2 and 3 of the Topical Index on page 1, the Appellee stated that all possible sources of non-taxable income had been negated. This statement is vigorously denied and is not supported by the evidence produced at the trial.

The Appellee's brief, page 14 states, "Throughout the investigation, Appellant claimed personally and and through his counsel, that his unreported net worth increases were the result of accumulated prior earnings."

The record does not support that statement.

When the investigating agents obtained the Appellant's statement in this matter, they were not seeking an explanation of the net worth increases. Revenue Agent Helmer F. Akola, a Government witness, testified concerning a conversation he had with the Appellant on June 12, 1962 [R. T. 264]. He asked the Appellant for the source of the currency used in a \$40,000 deposit to a bank account and in the purchasing of four \$5,000 cashiers checks [R. T. 273]. No mention was made of net worth increases.

The Appellant indicated that it had been his practice to withdraw \$500 a month in currency from his commercial account and to place the currency in a safe deposit box, but that he was unable to specify a source for the particular transactions with which the agent was concerned and he expected to explain the matter within a few days [R. T. 274]. The conversation of June 12, 1962, is at the most an ambiguous and equivocal claim of non-taxable source. It is certainly clear that neither the investigating agent nor the Appellant believed that the conversation amounted to an assertion by the Appellant that currency from a safe deposit box was the exclusive source of his net worth increases.

On page 15 of its brief, the Appellee states that in April of 1963, Appellant again offered an explanation of his expenditures. The explanation relied upon is Exhibit 81, the so-called "Fund Statement". That document, like the June 12, 1962 conversation, was prepared in response to an inquiry regarding the same two currency transactions [R. T. 58-60 and R. T. 30]. Furthermore, Exhibit 81 only purports to cover the taxable years 1953 through 1957, none of which were included in the Indictment.

Marshall G. Groener, the Government witness who prepared Exhibit 81, testified on direct examination that some of the figures on the statement were not accurate. The inaccuracy became apparent when additional records were acquired after the statement was made [R. T. 137].

To support its assertion that it was not required to negative *all possible* sources of non-taxable income because the Appellant had claimed a non-taxable source for his alleged net worth increases, the Government cites cases which apply the rule, "Where a taxpayer has committed himself to one specific explanation of

the source of funds expended . . .” and where the defendant said he had received no other funds from a non-taxable source. *Gatling v. Commissioner* (4th Cir., 1961), 286 F. 2d 139, 141; *United States v. Holovachka* (7th Cir., 1963), 314 F. 2d 345, 353.

Apart from the June 12, 1962 conversation and Exhibit 81, there is nothing in the record regarding any claim by the Appellant of a non-taxable source. Neither the June 12, 1962 conversation nor Exhibit 81 can be construed to commit the Appellant to one specific explanation of the source of all funds expended during the indictment years. The Appellant never stated that he had received no other funds from a non-taxable source.

Even if the inferences drawn by the Appellee from the June 12, 1962 conversation and Exhibit 81 are correct, they cannot serve as a substitute for proof that *all possible* sources of non-taxable income have been negated because the conversation and the Exhibit constitute non-judicial admissions which are inadmissible unless corroborated by independent evidence of the crime charged. *Smith v. United States* (1954), 348 U.S. 147; *United States v. Calderon* (1954), 348 U.S. 160. There is no independent evidence in the record of this case to show that the crime of tax evasion has occurred.

Throughout the years the Appellant has reported and paid a tax on very substantial profits. Some of the investments were undoubtedly made from this large income, but no claim was ever made that this was the sole source of the assets comprising Appellant's net worth.

Thus, this is not a case where the Government's burden to negate all possible sources of non-taxable income can be satisfied by sources claimed by the Appellant.

Again, on page 3 of Appellee's brief, under the title of "Statement of Facts", the statement is made that the Government negated the possibility that non-taxable funds were the source of the Appellant's unreported net worth, "thus logically concluding that the net worth increases were derived from some taxable source". It is the position of the Appellant that the Government has not negated all possible sources of non-taxable income as is required under the decision of the Supreme Court in the case of *Massei v. United States*, 335 U.S. 595 (1958). It has not even negated some obvious sources.

As pointed out in this Appellant's opening brief, page 20, the District Court indicated it was entirely possible for the Appellant to have had non-taxable sources of income, particularly loans [R. T. 106-107]. In addition to the factual distinctions, the courts have clearly not used *Rossi v. United States* (1933), 289 U.S. 89 in determining the requirements of a *prima facie* case in tax evasion prosecutions. See Discussion of Rossi, App. B.

In *Holland v. United States*, 348 U.S. 121, 138 (1954), the Court used *Rossi* to indicate that if the Government could show a likely source of taxable income it was not necessary to go further and negative the many possible non-taxable sources of income. The *Massei* case, *supra*, held that where no likely source of taxable income could be shown and where there was no *undisclosed business*, the Government could prove the case by negating all *possible* non-taxable sources. A careful review of the *Massei* case will show that *Rossi* and related cases cannot be applied to relieve the Appellee in this case of the burden to negative all possible non-taxable sources of income. The trial in *Massei* resulted in a conviction. On the defendant's appeal, the 1st Circuit reversed on the ground that no

likely source of taxable income had been proven. *Massei v. United States* (1st Cir. 1957), 241 F. 2d 895, 905. The case then reached the Supreme Court on petition of the Government. That Court affirmed the action of the 1st Circuit was a *per curiam* opinion indicating that if no likely source of taxable income could be shown, the defendant could be convicted if *all possible sources* of non-taxable income are negatived.

The case of *Yee Hem v. United States*, 268 U.S. 178 (1925) to which reference is made on page 18 of the Appellee's brief, has no application to the factual situation in this Appellant's case. The *Yee Hem* case involved illegal possession of opium. It was decided adversely to the defendant because of a specific provision in the Statute of a legal presumption that possession was in violation of law unless acceptable explanation was made to the contrary. In its opinion, the Court stated:

"Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional *weight of a countervailing legislative presumption.*"

In the Appellant's case we have no countervailing legislative presumption to shift the burden of proof. Furthermore, *Yee Hem* is cited in *Holland, supra*, at pages 138-139, to indicate that the burden does not shift to the defendant until the Government has made a *prima facie* case.

Wilson v. United States, 162 U.S. 613 (1896) cited on page 18 of Appellee's brief was a murder case in which defendant had been convicted and sentenced to be hanged. An examination of the case at page 616 indi-

cates that Wilson after his arrest was brought before one J. B. George a United States Commissioner where he was examined at length. The questions and answers were taken down and later offered at his trial as a confession.

Wilson did not testify at the trial but in the light of the statements he had previously made and the explanations he had made when before the United States Commissioner, the court ruled that the existence of blood stains at or near a place where violence has been inflicted is relevant and admissible in evidence and if not satisfactorily explained may be regarded by the jury as circumstances in determining whether or not a murder has been committed.

Clearly there is a rational connection between the existence of blood stains and the possible existence of a murder. However, in the Appellant's case there is no rational connection between the alleged increase in net worth and the existence of unreported income because the Appellee failed to prove a likely source or to negative non-taxable sources (see App. Br. pp. 10-14).

The Appellant's Opening Brief on pages 20 through 21, contains a detailed argument supported by references to the record that loans were a *probable* (not merely possible) source of non-taxable income which was apparent to the Government during the trial and which was an obvious "lead" which should have been checked out by the investigating agents. Apart from the assertion that the minimum amount of Appellant's liabilities during the indictment years was \$80.56 [R. T. 106], the record is utterly devoid of any showing that the agents checked to see if there were additional loans during the indictment years. Certainly, if the Government's net worth computation is not specific as to the amount of liabilities, it cannot be said that the net worth computation is reliable.

The Government introduced no evidence that the amounts shown on Exhibit 82 represented the only liabilities, municipal bonds and common and preferred stocks other than closely held corporations. The Government slides over this point without mentioning loans except on pages 9 and 10 of the so-called "Statement of Facts", where there is the *unsupported* statement that the Government's investigation negated the possibility that non-taxable funds, such as loans, could account for the net worth increases.

On page 11 of the Appellee's brief, it is noted ". . . that Appellant never claimed that he saved or accumulated these funds". The possible fact that he never made such a claim to the examining officers is by no means an indication that he ". . . never claimed that he saved or accumulated these funds".

At the bottom of page 9, Appellee's brief states that the Government's "meticulous investigation negated the possibility that non-taxable funds such as loans, gifts or inheritances accounted for Appellant's unreported net worth increase of \$144,000.00". The conclusion to be drawn from the record is that the examining agent did not make the intensive and exhaustive investigation required by the guide lines set forth in such cases as *United States v. Adonis* (3rd Cir., 1955), 221 F. 2d 717, or *United States v. Ford* (2nd Cir., 1956), 237 F. 2d 57 and other cases in which net worth approach has been used.

Further, Appellee's brief states: "During the indictment years, Appellant received no gifts or inheritances. Appellant's only loan was for the purchase of the apartment house in 1959." There is nothing in the evidence to support such statements to negate the possibility of gifts or inheritances received in the indictment years or to negate the possibility of additional loans at various times during the indictment years.

The evidence is clear that the Bennett family was well-to-do and had lived for many years in Des Moines, Iowa [R. T. 204]. Mr. Bennett died in 1950; prior to this time he had embarked on a program of transferring his assets and in 1950 when he died he left no estate. It is known that some of his assets were transferred to Mrs. Bennett prior to his death but there is no evidence in the record to indicate that he had not transferred some of his assets to Mrs. Peggee Feichtmeir in addition to the transfers with which Mr. Kirk Mallory (Mrs. Bennett's Trustee) subsequently became familiar. There is nothing in the evidence to indicate that the examining officers conducted any investigation of the Bennett family or of the public records in Des Moines, Iowa, concerning such possibilities.

III.

The Appellee Has Not Produced Evidence of a Likely Source.

Beginning on page 5 of the Appellee's brief, under the title "Appellant's Business Interests", the Appellee lists the enterprises in which the Appellant was engaged. The listing of Appellant's businesses does not indicate a source of omitted taxable income. The businesses were quite successful and almost completely solely owned by the Appellant. There is no evidence that the businesses were conducted improperly or that they had improperly reported income on their tax returns. There is no evidence that the businesses received income in currency nor evidence of diverted funds from the businesses to the Appellant.

On page 8 of Appellee's brief, as part of its discussion under the title "Other Investments" (p. 7), there appears a carefully worded misleading statement. The statement is as follows: "In tracing the Appel-

lant's financial history, the evidence concerns 17 separate banks or branches throughout California, in San Antonio, Texas and in Mexico City (Exhibits 13, 14-17, 41, 62-63, 71-75, 77-79, 83, 88, 91, 95, 97, 82, 101)". The Appellant did not have any bank accounts in San Antonio, Texas; he did not have a bank account in Mexico City or in any other place in Mexico and there is no evidence to the contrary in the record. By reference to the Exhibits, it will be seen that they relate largely to individual cashiers' checks, individual bank deposit tickets, individual bank signature cards and individual bank withdrawal orders from personal as well as business bank accounts. In addition, Exhibit 82 consists of the front page of the Bill of Particulars and Exhibit 101 relates to the Federal Reserve records of the issuance of certain Federal Reserve Notes.

The Appellee admits on page 21 of its brief that there are no false entries in the records of the various corporations in which the Appellant is interested. But the Appellee urges that the Appellant maintained no books for certain businesses and that therefore a likely source can be inferred. The Appellee does not designate the volume and page of the transcript from which this statement can be drawn. The facts are that there were records of all of his transactions in the business office of the Appellant except those that pertained to his personal investments in stocks and bonds and to his personal living expenditures. Appellant maintained records of personal investments consisting of cancelled checks, checkstubs and a loose leaf booklet [R. T. 67].

The Appellee for some reason cited the case of *Barsky v. United States*, 339 F. 2d 180 in support of its contention that a likely source can be inferred. It is

respectfully submitted that the facts and circumstances of the *Barsky* case are so far removed from the situation with which we are here concerned that it has no application whatever.

Appellee on page 21 states, “. . . it was also shown that Appellant was receiving money from Mexico, indicating an undisclosed Mexican business source.” That statement is entirely false. All the testimony pertaining to the Mexican currency transaction was from the Government’s witness, Julius L. Haufler [R. T. 254-260]. This testimony can be summarized as follows:

Mr. Haufler is a clerk in the Federal Reserve Bank in San Antonio, Texas. On three separate occasions he observed transactions in which the Frost National Bank of San Antonio, Texas obtained new currency in the form of \$100 bills from the Federal Reserve Bank and in Mr. Haufler’s presence delivered the currency to a representative of Banco Nacional of Mexico City. These three withdrawals were in the following amounts: \$1,999,000.00; \$1,700,000.00; and \$1,915,000.00. Obviously they were made in the course of normal banking transactions which in no way related to the Appellant.

Some of the same currency was, according to the record, expended by the Appellant when he purchased stocks at intervals as short as one and one-half months and as long as two years and three months after the transfer from the Federal Reserve Bank in San Antonio to the Frost National Bank and, in turn, to the Banco Nacional. There is not a single scrap of evidence in the record from which one could infer that the Appellant had any connection whatsoever with the Banco Nacional, or its representative, or the Federal Reserve Bank, or Mr. Haufler. There is absolutely noth-

ing to show that the Appellant received the currency from anyone in Mexico, or that he had a Mexican business. There is nothing insidious in the fact that the Appellant used currency in Los Angeles which at one time may have been in Mexico.

This court should take judicial notice of the fact that currency transferred to foreign countries sooner or later is returned to domestic use in this country.

It is respectfully submitted that no unfavorable inference is to be drawn from the fact that the Appellant frequently converted salary and other checks into currency and accumulated this currency for emergency purposes and favorable purchasing leverage in connection with business transactions. On the date (1) that the Appellant was interviewed by Revenue Agent Akola, they went together to a safe deposit box where a bundle of currency was found, the exact amount of which was not determined by the Agent, but which was topped by a hundred dollar bill. There is no support for the statement currency was received in the same year it was expended by the Appellant and no reference to the transcript appears in the Appellee's brief. It is nothing less than fantastic for Government Counsel to contend "that the currency was generated by undisclosed business interests". Considering the time involved in the investigation of this case and the extent of the available trained and skilled manpower, it is incredible for one to believe that if the Appellant was engaged in any business other than that which has been disclosed in the records of this case, that

the Intelligence Division of the Internal Revenue Service of the United States Government would be unable to find it.

IV.

The Appellee Has Not Established Willfulness to Evade and Defeat Income Tax.

The Appellee states: "The pattern of understatement and the substantiality of evaded tax are indicia of intent". In support of this, the statement is made: "Appellant evaded over 80% of his correct tax liability for 1959". This would seem to be the greatest example of a boot strap operation that could be imagined. In other words, it is assumed that the correct tax liability has been established for 1959 beyond all question of doubt and that by reason of this the inference can be drawn that the Appellant was guilty of evasion. This simply begs the question. One of the fundamental issues in the case is whether there was any unreported taxable income. Unless it is established beyond reasonable doubt that there was, there can be no willfulness.

The records show that the Appellant, Armand C. Feichtmeir is a substantial business man with an impeccable reputation who has been contributing heavily for a period of years to the support of his Government, both Federal and State. The schedule below indicates that he reported taxable income for the years 1951 to 1957 inclusive of \$271,731.51 and paid a tax of \$103,590.29. For the years 1958 to 1961 inclusive he reported a taxable income of \$201,308.99 and paid a tax of \$81,277.99. The total for the eleven year period is a taxable income reported of \$473,040.50

and a tax paid of \$184,868.28. The tax reported and the tax paid is reflected in the schedule below. Exhibits 127 and 128.

	Taxable Income Reported	Tax Paid
1951	9,246.77	2,004.16
1952	26,600.19	7,918.08
1953	81,133.62	40,262.20
1954	40,106.27	14,579.51
1955	35,527.51	12,116.67
1956	37,986.47	13,412.67
1957	41,130.68	15,112.28
Total	<u>\$271,731.51</u>	<u>\$103,590.29</u>
1958	50,472.53	20,509.84
1959	38,522.15	13,661.86
1960	48,188.06	18,494.04
1961	64,126.25	28,612.25
Total	<u>\$201,308.99</u>	<u>\$81,277.99</u>
Total 11 years	\$473,040.50	\$184,868.28

The third Mexican currency transaction, mentioned in the Appellee's brief involved a delivery on September 3, 1958 of \$1,915,000.00 in one hundred dollar bills by the Frost National Bank from the Federal Reserve Bank to the Banco Nacional in Mexico City. Twenty-three of these bills were used by the Appellant in October of 1958 in a payment to Hill Richards & Co. of Los Angeles, California. With this payment of \$2,300.00 the Appellant also made a payment by a personal salary check of \$1,500.00 for a total of \$3,800.00 [Ex. 100]. This was done so that with a credit balance of \$1,200.00 in his Hill Richards & Co. account at that time, he could secure a check from Hill Richards & Co. payable to a valued employee to whom the Appellant wished to give a bonus of \$5,000.00 without knowledge

thereof reaching other employees in his business [R. T. 243, 422, 423; Ex. 6]. The use of this personal salary check in conjunction with this currency, completely negates any idea of concealment or a premeditated plan to evade taxes. Attention is again invited to the fact there is no evidence that the Appellant had any direct transactions with either the Frost National Bank or the Federal Reserve Bank of Dallas, in San Antonio nor with the Banco Nacional in Mexico City.

There is no basis for the inference that the P.A.F. account was set up and used for personal expenditures as a means of evading his tax liability. The payments for the apartment house were made out of this account. There is, and could be, no concealment about this. This transaction and the use of this account were an open book to any investigator, State or Federal, who wanted to check the records of the banks, the title company, the escrow agents or any other entities with whom he was doing business.

The Government has the burden of proving beyond a reasonable doubt that any under-statement of tax was intentionally and wilfully done with a bad purpose and an evil motive. It must be established that there was a specific attempt to accomplish that which is contrary to law. This Court in *Bernard Bloch v. United States*, 221 F. 2d 786 (9th Cir. 1955) stated:

“Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

‘The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant’.

That is the correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent in-

volving the bad purpose and evil motive to evade or defeat the payment of his income tax. *Wardlaw v. United States*, 203 Fed. (2d) 884 [43 AFTR 878].”

It is respectfully submitted that the usual badges of fraud showing a specific wilful intent are not present in this case and that the verdict is not sustained by the evidence.

V.

The Appellee Did Violate the Constitutional Rights of the Appellant.

A full discussion of this issue is contained in the Appellant's opening brief pages 23-26.

The Appellee's brief on page 22 states: “The Revenue Agent did not compel the Appellant to appear, produce records, or give testimony. The provisions of Section 7602 of Title 26, were not used and it is inapplicable.” Of course the agent did not cite Section 7602 to the Appellant during his interviews, however, he was certainly acting under color of *some authority* and Section 7602 is the only possible authority for the interviews.

Kohatsu v. United States (9th Cir. 1966), 351 F. 2d 898, cert. den. (June 20, 1966), should be distinguished because of the existence of the informant's letter in this case.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALVA C. BAIRD

APPENDIX A.

Excerpt From Reporter's Transcript.

Los Angeles, California, Wednesday, December 8, 1965.
1:30 P.M.

"The Court: The defendant is present with counsel. Proceed.

Mrs. Dunne: Your Honor, before proceeding further with the stipulation, there is one point to be determined first in regard to this.

An objection has been made to the stipulation concerning assets and liabilities. The Government wishes to be sure that it does not preclude itself from offering further evidence concerning these assets and liabilities.

The Court: There will be no limitation if it goes purely to knowledge and intent. But I am not going to allow any testimony to come in—if you refuse to stipulate, I am not going to let it come in any way.

Mrs. Dunne: Yes.

The Court: So you have got no choice.

Mrs. Dunne: Yes, sir.

The Court: I am not going to just sit here, as I have seen some judges do, and let stipulations go in and then let the Government retry the whole case on all the matters that have been stipulated to.

This, in the vernacular—I won't say it, I guess I should use something about birds, but I won't.

Mrs. Dunne: In this regard, your Honor, the offer of stipulation we have marked—

The Court: Now, you understand I am not going to stop you from giving evidence.

Mrs. Dunne: All right.

The Court: Independent of the stipulation which relates to intent.

Mrs. Dunne: Right.

The Court: Or to corroborate something. But you don't need to corroborate a stipulation.

Mrs. Dunne: Yes, sir.

The Court: Because when a fact is stipulated to it becomes admitted and presumptive and that is the end of it.

Mrs. Dunne: Yes, sir.

The Court: All right. I will take the stipulation.

Mrs. Dunne: We will have to offer it in oral form.

The Court: All right. Shall I follow the motion for bill of particulars—I mean the indictment?

Mrs. Dunne: Yes.

Mr. Galen: I suggest your Honor follow the assets and liabilities sheet.

The Court: All right.

Mrs. Dunne: To clarify this, we have marked as Exhibit 82 the single page for assets and liabilities.

The Court: You are talking about the first page of the bill of particulars?

Mrs. Dunne: That is right, the first page.

The Court: This is exhibit what?

Mrs. Dunne: 82.

The Court: 82, the first page of the bill of particulars.

Proceed.

The Clerk: I have so marked it, counsel.

(The exhibit referred to was marked Plaintiff's Exhibit 82 for identification.)

Mr. Galen: I don't know that it means it is evidence of the truth of the matter stated, except as a stipulation to explain it.

The Court: Well, I don't understand you, counsel.

Mr. Galen: There are certain matters, your Honor, that are not stipulated to as a fact on Exhibit 82.

The Court: Oh, that, of course, you are stipulating—go ahead, you state it.

Mr. Galen: We are only stipulating to certain portions—

The Court: Well—

Mrs. Dunne: They are as follows, with the exception of:

Common and preferred stocks, other than closely held corporations—

The Court: Let me find—where do I find this?

Mr. Galen: Your Honor, that appears down about the 15th line, common and preferred stocks, \$38,297.96.

The Court: The 15th line?

Mr. Galen: Roughly, yes—no, the 14th line.

The Court: Oh, I find it, yes.

Common and preferred stocks other than closely held corporations.

Mr. Galen: Yes.

Mrs. Dunne: And municipal bonds just above on line 23—

The Court: I will check mark this, which is not included in the stipulation.

And the next one?

Mrs. Dunne: That is the municipal bonds, your Honor, which starts at line 23.

The Court: Municipal bonds?

Mr. Galen: That is correct.

The Court: Now let me see if I understand—what is the stipulation?

Mrs. Dunne: That the assets as listed on Exhibit 82 of the year ending December 31, 1957 to December 31, 1958; December 31, 1959 to December 31, 1960; and December 31, 1961 were, in fact, owned by the defendant Armand C. Feichtmeir as listed.

The Court: And were as set forth on this exhibit?

Mrs. Dunne: Exhibit 82.

The Court: Exhibit 82.

Mrs. Dunne: And further that the amounts listed for his assets represent an actual cash outlay for certain assets of Exhibit 82.

Mr. Galen: Representing defendant's costs for the assets.

The Court: Costs of the defendant, all right.

Anything further?

Mrs. Dunne: Yes. The liabilities, as listed on Exhibit 82 for the years ending 12/31/1957; 12/31/1958; 12/31/1959; 12/31/1960; 12/31/1961, were in fact owned by the defendant Armand C. Feichtmeir.

The Court: Talking about the \$80.56?

Mrs. Dunne: That is it, that is the only liability.

The Court: That is what you say. They may have a different story.

Mrs. Dunne: I said in Exhibit 82, that is right.

The Court: Oh, well, I can't imagine—it may be true that a man has only \$80.56 in liabilities. Even the people on relief have that many liabilities, probably more.

Mrs. Dunne: Yes.

Have I correctly stated the stipulation, counsel?

Mr. Galen: That is correct.

The Court: That does not preclude counsel from offering evidence of the defendant to show that there were additional liabilities, I understand that; is that right?

Mrs. Dunne: That is right.

The Court: All right.

Mr. Galen: Or assets, your Honor.

Mrs. Dunne: Or assets.

The Court: Or assets.

Mr. Galen: That is right.

The Court: In other words, you may try to establish that there were additional cash or other assets?

Mr. Galen: Yes.

The Court: Very well. So stipulated.

Mrs. Dunne: Mr. Groener, will you resume the stand, please.

APPENDIX B.

Rossi v. United States (1933), 289 U.S. 89. The quotation from the Rossi case which appears on page 18 of Appellee's brief is neither precisely accurate nor complete. A sentence which is not given in full and which is lifted out of context can, and does, frequently result in a distorted meaning.

The defendant, Peter Rossi, was indicted for failure to register a still for the manufacture of alcoholic spirits and for failure to give the bond required of distillers. By referring to the decision of the C.C.A. 7th Cir. June 30, 1932, 60 Fed. 2d 955, to obtain the facts involved in the proceedings, it will be observed that under Paragraph [2] there was ample evidence to indicate that the defendant Rossi and associates were engaged in an illegal distilling operation. Having determined this, the Court concluded that an inference could be drawn that the still was not registered and that no bond of a distiller had been approved. Having established that the entire operation was illegal it follows that there could have been no registration and no bond issued as required by law.

The Court concluded that it was not incumbent on the prosecution to produce positive evidence to show that the still had not been registered for the manufacture of alcoholic spirits or that a bond had been given as required by the Statute.

APPENDIX C.

Miscellaneous Errors in Appellee's Brief.

(1) For examples: The addition of the items shown in Exhibit 127 comprising the Government's computation of the Appellant's net worth at 12/31/50 is in error by \$5,000.00. The figure shown for the Appellant's cost of common stocks held at 12/31/50 is also in error [Exs. 123 and 127].

The statement on page 5 that the program of non-occupational insurance for braceros and agricultural laborers had expanded by 1961 so that the Appellant insured all but two Growers in the State of California is incorrect. The facts are, that the program had expanded as early as 1951 at which time all but two *associations of Growers* (not just two Growers) in the State of California were insured by the Appellant.

On page 9 of Appellee's brief, it is stated that in 1950 Appellant purchased a home for \$34,000.00. This is in error. The cost of the home was only \$24,000.00 as indicated in the Government's net worth computation Exhibit 128. The home was owned by the Appellant on December 31, 1961, so no effect on the Appellant's income resulted from the error, but the error is indicative of the mis-statements which appear throughout the Appellee's brief.

On page 8, the statement is made "his investments increased in value from \$1,786.60 as of December 31, 1950 to \$93,775.81 as of December 31, 1961. Exhibit 127 in evidence lists the starting figure at \$17,866.02 rather than \$1,786.60. Moreover, there is nothing in the evidence to indicate that the Government agents had negated the possibility of additional common stocks being owned by the Appellant at December 31, 1950.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH G. STOREY, JR.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20932 ✓

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

FILED
JUL 21 1966
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NUV 4 1966

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH G. STOREY, JR.	}	No. 20932
vs.		
UNITED STATES OF AMERICA,		
<i>Appellant,</i>		
<i>Appellee.</i>		

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

APPELLANT’S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment of conviction entered by the United States District Court for the Western District of Washington, Northern Division. (R7) (“R” shall refer to the Transcript of Record, and the number following to the page therein.) The District Court had jurisdiction under Title 18, Sec. 3231, United States Code. The indictment alleged an offense against the Universal Military Training and Service Act (50 U.S.C. App. Sec. 462). (R1) This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure, since the notice of appeal was filed in the time and manner required by law. (R8)

STATEMENT OF THE CASE

Explanation of Exhibits:

Appellant's Selective Service file was submitted into evidence as Government's Exhibit 1, 2 and 3. Exhibit No. 1 being the main portion of his Selective Service file. Exhibit No. 2 being letters filed with the local board after the Selective Service file had been forwarded to the State Director for photostating. Exhibit No. 3 is the appellant's order of induction. ("Ex." shall refer to Government's Exhibit No. 1, the appellant's Selective Service file, and the number following, to the paginated document therein. Pagination is in pencil in the lower right hand corner of each document.)

The original of the Hearing Officer's recommendation to the Department of Justice was entered into evidence, by stipulation, as Defendant's Exhibit A-1. (App. B.)

The reporter's Transcripts of Evidence were dated and covered the following: arraignment dated August 2, 1965; the hearing dated December 6, 1965; argument dated January 21, 1966, and the sentencing dated February 25, 1966. ("T", unless otherwise indicated, shall refer to the reporter's Transcript of Evidence for December 6, 1965, covering the hearing.)

Concise Summary:

Appellant is a conscientious objector, opposed to both combatant and noncombatant duty in the armed forces. He is, however, willing to work in the civilian work program as an alternative mode of service. (Ex. 156; T. 113) He was classified I-A-O (available for noncombatant duty) by the Appeal Board, subsequently ordered to report for induction but refused. He was indicted for an alleged violation of the Universal Military Training and Service Act. (R1; 50 U.S.C. App. Sec. 462)

Appellant pleaded "Not Guilty," waived trial by jury (T 8/2/65 p 5; R2) and was tried on December 6, 1965.

Motion for Judgment of Acquittal was made at the close of the Government's case (R5) which was argued and denied. (T. 26) The Motion was renewed, with additional points added, at the close of all the evidence (R3), was argued and denied. (T 1/21/66, pp 4-6) Appellant was convicted on January 21, 1966 (T 1/21/66, p 6) and sentenced on February 25, 1966 (R14) to the custody of the Attorney General for a period of four years. (R7)

Statement of Facts:

On July 27, 1958, the appellant started working at Boeing as a draftsman. He worked on drawings of maintenance and electronic testing equipment. The equipment was used to test component parts of a missile. His job had nothing to do, directly, with the missile itself. (Ex. 86, 153; T. 30)

On March 25, 1963, appellant informed his local board that he embraced the principles of conscientious objection, opposed to both combatant and noncombatant duty, and requested the Special Form for Conscientious Objectors. (Ex. 155, 156)

Other members of the appellant's church were also employed at Boeing. (T. 35, 36, 54) Appellant was informed by two of these members, Gerald Lindberg and Donald Roulette, that they had inquired and that their employment was condoned in the eyes of the church. (T. 30, 31, 46-48, 51, 52)

The Appellant's local church in Seattle was in fact under a misimpression as to the teaching of the Headquarters church regarding defense work. The local church viewed such work as permissible and so advised members who asked about the subject. (Ex. 67, 69, 90; T. 53, 54) Appellant, therefore, was under the sincere conviction that his job was permissible in the eyes of God and his church. There was

no conflict or compromise with his conscience. (T. Redirect 44, 45; Ex. 61, 55)

On April 3, 1963, the appellant wrote his local board and specifically requested information and advice from them regarding his work at Boeing. He informed them as to the type of work he was doing and then asked:

“If you believe this to be defense work, then I will transfer to the Dyna Sour Program (which is for peaceful use) or quit immediately and take my chances of finding another job.

“Please let me know if my job is considered defense work and what I should do.” (Ex. 153)

The local board chose to totally ignore this request for advice and information. Neither did they refer the appellant to an advisor or an appeal agent. (T. 31, 32)

The State Director had appointed three or four advisors (32 CFR 1604.41) and one government appeal agent. (32 CFR 1604.71; T. 27) The names of the advisors were only posted on the bulletin board in the local board. (T. 28) Neither the local board nor the Hearing Officer ever referred the appellant to an advisor or appeal agent. (T. 32; 34) The appellant was only in the local board one time, and in fact never saw the list nor had knowledge from any other source that they even existed. (T. 32)

The appellant filed his Special Form For Conscientious Objectors on April 4, 1963, claiming exemption from both combatant and noncombatant duties. He stated as his grounds his unwillingness to use injuring force, that he was an Ambassador for Christ, that he could not become a slave to man by entering the Service, that Christ taught not to fight or resist evil nor to take vengeance, but to render good for evil, that his duties to God were higher than his duties to man and that if he transgressed God's laws he would lose salvation and be destroyed in the Lake of Fire. (Ex. 131-139)

The local board reclassified the appellant I-A (Ex. 10) and he requested a personal appearance hearing (Ex. 142) which was held on May 20, 1963. (Ex. 10) The appellant was retained in class I-A and he appealed. (Ex. 10, 121)

In his letter of appeal, the appellant informed the local board that he had been baptized into the Church of God on May 26, 1963, subsequent to his hearing before them. He also set forth the doctrine of the church, opposing warfare and service in the armed forces, as set forth in their Constitution. (Ex. 121, 123)

During the summer of 1963, appellant held a brief conversation with Mr. Friddle, the local minister of his church. From this conversation he was further led to believe that his work at Boeing was permitted in the eyes of his church. (T. 33; Ex. 61)

To further insure acceptance of his conscientious objector claim, the appellant even transferred from his position of draftsman on test equipment, to the aircraft division of Boeing. There his work as draftsman pertained only to unarmed cargo planes. (T. 33, 34, 43)

An extensive investigation was made of the appellant's background by the F.B.I. The resume of this investigation cites seventeen different witnesses. None of the witnesses gave statements against the sincerity of the appellant's conscientious objector beliefs. Nine of these actually gave affirmative statements that they felt he was sincere in his claim. (Ex. 84-100)

On December 4, 1963, the appellant attended the hearing before the special Hearing Officer for the Department of Justice. He was accompanied by Mr. Lindberg as a witness. (App. B)

The appellant specifically asked the Hearing Officer if his work at Boeing was wrong or if it hurt him in any way. The Hearing Officer's reply was, "It doesn't matter to me." (T. 34, 50) The Hearing Officer did not advise the appellant

that he had a right to have an attorney, to have him present during the hearing, or of his right against self-incrimination. (T. 35, 50) He advised the appellant that his chances of receiving a I-O classification "looked very favorable." (T. 41, 50)

The appellant stated, as his grounds against noncombatant duty, that if he participated in a killing organization he would be partaking of their sins and would be just as guilty as they; that God commands him not to become a slave to man by entering into the military, and other religious reasons. (T. 37, 50; Ex. 59, 61)

The special Hearing Officer filed his recommendations with the Department of Justice. (Def's. Ex. A-1; App. B.) He found that the appellant was sincere in his representations as to religious training and belief, that he was in fact a conscientious objector to combatant military service, but that there was nothing within the limitations of his religious training and belief that would prohibit "his service in a non-combatant capacity or in an area of assigned public work." (App. B, p. 4)

The Department of Justice filed its report with the Appeal Board and recommended the appellant be classified I-A-O. Their basis was the appellant's alleged statement to the local board of his desire to preach; the fact that he filed his conscientious objector claim after his physical and divorce; that he worked at Boeing and the Hearing Officer's conclusion that there was nothing in the appellant's religious training and belief that would prohibit noncombatant duty. (Ex. 74-82)

During 1965, the Headquarters church, of appellant's faith, received word that the local church in Seattle was teaching that defense work was acceptable in the eyes of the church. A ministerial counsel was held at Headquarters and their true position against defense work verified. (Ex. 67; T. 35, 36, 53, 54)

When this word was communicated to the Seattle church the appellant quit his job at Boeing, as well as many other church members. (Ex. 55; T. 35, 36, 53, 54) The appellant notified the Appeal Board he quit Boeing. (Ex. 55)

Immediately after the church in Seattle was notified of the Headquarter's decision regarding defense work, the local minister wrote the appellant's Appeal Board. (Ex. 58) In the letter he denied that either he or the church sanctioned appellant's working at Boeing and gave the misimpression that appellant had misstated the character of his work to him.

The minister never told the appellant he sent the letter. The Appeal Board never notified the appellant it was received or gave him any opportunity to rebut it. The appellant had no knowledge of the letter's existence from any other source. (T. 36, 37)

On April 20, 1964, the Appeal Board classified the appellant I-A-O. (Ex. 10)

On June 5, 1964, an attorney representing the appellant, wrote the local board. (Ex. 46) He called to their attention events that had occurred subsequent to the appellant's personal appearance before the board and prior to the induction order being issued, and requested the classification be reopened.

The new information submitted was the fact that the appellant was baptized into a church professing principles of conscientious objection (Ex. 121) and that he quit his job at Boeing after the misunderstanding regarding this work was clarified. (Ex. 55)

The local board met on June 5, 1964, to consider the appellant's file. They informed the appellant's attorney that the "information submitted did not warrant requesting the authority of the State Director to reopen the classification." (Ex. 120)

Appellant was ordered to report for induction on June 9, 1964. (Ex. 51) He refused induction.

Through the foregoing Selective Service process the appellant clearly made out a prima facia case sustaining his conscientious objector claim as evidenced by some of the following:

Ten character references were filed on his behalf testifying to his sincerity. (Ex. 147, 149, 151; Govt's. Ex. 2)

The Hearing Officer found him to be sincere in the representation of his religious training and belief. (App. B, p. 4)

The F.B.I. knowingly questioned at least seventeen witnesses. None of these gave any evidence of his being insincere. Nine actually confirmed his sincerity. (Ex. 84-100)

The trial court, who had the opportunity to observe the appellant, at the time of his finding of guilty stated, "... (S)o far as my own view is concerned, I don't know, Mr. Storey may be most sincere in his claim throughout." (T. 1/22/66, p 4) Then at the time of the sentencing again stated, "... (Y)ou are not going to need rehabilitation so far as your moral character is concerned. There's nothing to indicate that you have any criminal tendencies as we ordinarily perceive that tendency." (T. 2/25/66, p 4)

The formidable doctrinal requirements of appellant's church, adhered to by him, are summarized in Appendix F.

QUESTIONS PRESENTED AND HOW RAISED

I

After a local board and a Hearing Officer for the Department of Justice refused to answer an appellant's plea for information as to whether or not his job constituted defense work, can the Justice Department then utilize the very point the appellant was kept ignorant of as a basis in fact for denying his conscientious objector claim?

This question was raised by ground five of the Motion for Judgment of Acquittal. (R7)

II

Whether an Appeal Board can receive ostensibly derogatory information unknown to the appellant, not inform him so as to deprive him the opportunity of explaining it as he was able to do, and still validly classify the appellant in an unacceptable classification?

This question was raised by ground two of the Motion for Judgment of Acquittal. (R 3)

III

Can a local board receive information requesting a reopening of appellant's claim and then validly refuse to do so under a misunderstanding of the law giving rise to an erroneous and illegal standard?

This question was raised by ground eight of the Motion for Judgment of Acquittal. (R 4)

IV

Can the local board, after receiving new information justifying a change in the appellant's status, arbitrarily and without a basis in fact refuse to reopen his classification?

This question was raised by ground seven of the Motion for Judgment of Acquittal. (R4)

V

Does an ambiguous Hearing Officer's recommendation to the Department of Justice, and the arbitrary resolving of that ambiguity by the Department of Justice in the recommendation to the Appeal Board, violate due process?

This question was raised by ground four of the Motion for Judgment of Acquittal. (R 3)

VI

Whether the appellant's I-A-O classification is a basis in fact or whether it is arbitrary and capricious?

This question was raised by ground three of the Motion for Judgment of Acquittal. (R 3)

VII

Was the Department of Justice's recommendation to the Appeal Board predicated on an illegal basis when it sought to adopt the Hearing Officer's limited meaning and definition of appellant's religious beliefs?

This question was raised by ground six of the Motion for Judgment of Acquittal. (R 3)

VIII

Whether the failure of the special Hearing Officer for the Department of Justice to advise the appellant of his right to an attorney and of his right against self-incrimination, violated the appellant's rights under the Fifth and Sixth Amendments of the U. S. Constitution?

This question was raised by ground one of the Motion for Judgment of Acquittal. (R 3)

IX

Whether the Court properly denied the introduction of the witnesses' testimonies?

This question was raised by objections to testimonies and offers of proof. (T. 46, 47, 49-54)

SPECIFICATION OF ERRORS

I

The District Court erred in failing to grant the Motions for Judgment of Acquittal made at the close of the Government's case and at the close of all evidence.

II

The District Court erred in convicting the appellant and entering a judgment of guilty against him.

III

The District Court erred in denying the admission of certain testimony offered by witnesses for the appellant:

Testimony of Gerald Lindberg

Grounds urged for objection were "heresay" and "improper." (T. 46, 47) Objections were sustained. (T. 47)

The full substance of the evidence rejected was that the witness and appellant had the same job at Boeing. That a ministerial assistant from appellant's church told the witness that the work they were doing was permissible in the eyes of God and the church. (T. 47)

Grounds urged for objection to other portions of the testimony were: "The Court: I am not, I have no right to make any judgment on this other than whether or not there is anything in the record . . . Mr. Swofford: That is the reason I objected." (T. 49) Objection sustained. (T. 49, 51)

The full substance of the evidence rejected was that Mr. Lindberg accompanied Mr. Storey as a witness during the hearing before the Hearing Officer. That appellant's religious ground for noncombatant duty was that he could not become a slave to man, the idea that he could not become a part of any killing organization and that God was avenger. That appellant asked about his job at Boeing and the Hearing Officer answered it was immaterial to him. That

the Hearing Officer thought his recommendation would be favorable. That the Hearing Officer never advised him of his right to see an advisor or appeal agent or to have an attorney at the hearing or to remain silent. (T. 50)

Testimony Of Donald Roulette

Grounds urged for objection were, "We have an affidavit in the file . . . The facts and information are in the file." (T. 52) Objection was sustained. (T. 52)

The full substance of the evidence rejected was that the witness had a conversation with the appellant in which the appellant asked whether or not their work at Boeing was right in the church's eyes. That the witness related a conversation with the ministerial assistants from the appellant's church in which they stated that it was acceptable and permissible in the eyes of the church. (T. 52)

Testimony Of Valdon White

Grounds urged for objection was, "We are getting into hinterland." (T. 53)

The objection was sustained. (T. 53)

The full substance of evidence rejected was that the witness was a minister of appellant's church in Seattle, Washington. That the Seattle church, prior to June, 1964, condoned its members working in a job that would be considered defense work. That subsequent to June, 1964, the Seattle church was advised by the Headquarters church that the teaching was error. That as a result of this, fifteen church members quit or transferred from Boeing, and Mr. Storey was one of them. That he had known Mr. Storey for over three years and, in his opinion, Mr. Storey was sincere in his conscientious objector claim. That as a minister, he had experience in seeing men truly become sincere conscientious objectors within a relatively short time. (T. 54)

ARGUMENT

I

THE LOCAL BOARD'S FAILURE TO RESPOND TO APPELLANT'S INQUIRY, OR TO REFER HIM TO A SOURCE FOR ADVICE — A SELECTIVE SERVICE APPEAL AGENT OR ADVISOR — DEPRIVED HIM OF CRUCIAL COUNSEL AND ADVICE AND INDUCED HIM INTO THE VERY CIRCUMSTANCES UPON WHICH SELECTIVE SERVICE IS DENYING HIS I-O CLASSIFICATION.

The appellant was working at Boeing when he embraced the principles of conscientious objection. (Ex. 155, 156). Desirous of doing all that he could to insure acknowledgment of his beliefs, the appellant wrote the local board and asked:

"If you believe this to be defense work, then I will transfer to the Dyna Sour Program (which is for peaceful use) or quit immediately and take my chances of finding another job. Please let me know if my job is considered defense work and what I should do." (Ex. 153)

The local board never did answer the appellant's plea for advice. It never referred him to the Government appeal agent or any one of the three Selective Service advisors. (T. 27, 32) They chose to simply ignore it.

When the appellant appeared before the special Hearing Officer, he even pursued the point. He asked, regarding his job, "Is this wrong or would this hurt me in any way?" The Hearing Officer replied, "It doesn't matter to me." (T. 34)

But apparently it did matter to the Department of Justice! For they very candidly castigated the appellant's employment in their recommendation to the Appeal Board. Quoting, no less, seven cases to confirm their attitude. (Ex.

80) This case would not be before the Court today had the Government been equally as willing to inform appellant when he sought this information on two occasions.

Let us recall that the appellant was classified I-A-O. The only ostensible basis in fact for this classification was that the appellant worked at Boeing. (This point is fully developed under Point VI.)

Now let us recognize this for what it is! The local board wilfully refuses to answer the appellant's inquiry or refer him to an advisor. The Hearing Officer does likewise. This silence induces and lulls the appellant into maintaining his status quo. Into a situation of inaction. Now we find the Government attempting to take advantage of the very situation they, themselves, have engendered.

A course of conduct hardly according to Hoyle — to say the least. Case law so confirms.

The controlling case on this point is found in *U.S. v. Liberato*, 109 F. Supp. 588 (W.D. Pa. 1953). There the registrant was classified I-A by the Appeal Board. He was sent a form to sign, concerning I-W work, which provided it was subject to "such regulations as the President shall prescribe." There as here the local board did not respond.

On page 590 the Court straightway resolved the point in favor of the defendant and stated:

"By reason of the draft board's failure to furnish defendant such information as requested, from which defendant could have rendered a precise and unequivocal answer as to his willingness to make himself available for a work assignment to be determined by the President of the United States, it is my judgment that the Government has failed to establish beyond reasonable doubt defendant's evasion of the Selective Service Act, and defendant is adjudged not guilty."

In another case of *Glover v. U.S.*, 286 F. 2d 84 (8th Cir. 1961) we find a circumstance in which the local board sent

a fifth classification notice to the registrant which only advised him "in form," but not specifically, the reason for it. The Court reversed the conviction. The strong language used in doing so, on page 90, is equally applicable when applied to the facts before us:

"While this fifth notice did again, in form, notify appellant of his right to appeal, the failure on the part of the board to explain to or inform defendant of the reason therefor (whether intentional or not) effectively deprived him of knowledge of the significance of such action. Such knowledge was essential to an understanding of his rights and of the necessity of further action by him to enable him to properly exercise and protect his rights. In the absence of such explanation or additional information, the appellant might, as a reasonable person, assume and believe that nothing further was required or could be done.

"There was no further reason for writing anymore. Under the existing circumstances we believe *the board owed a duty to appellant* to advise him as to the reason for the fifth classification notice, and that its failure to do so was *arbitrary, unfair and tantamount to the withholding of vital and essential information to which he was entitled as a basis for the exercise of his rights.*" (Emphasis added.)

Other applicable cases are:

U.S. v. Giessel, 129 F. Supp. 223 (D. N.J. 1955). Defendant did not appeal within the ten day limitation period. At no time was he apprised of his right to consult with the Selective Service advisors nor did he see any notice posted regarding them, nor was any such notice called to his attention. On page 225 the court held that this combination of events innocently misled him and deprived him of his procedural rights.

U.S. v. Derstine, 129 F. Supp. 117 (E.D. Pa. 1954). Registrant filed a request for an appeal "or" a personal ap-

pearance before the local board. The local board gave an appeal. The Court said on page 120 that he was entitled to an appearance before the local board and that any time that a registrant makes a request, no matter how ambiguous or unclearly stated, the writing should be construed in favor of the registrant and the local board should contact him for clarification.

For another very interesting aspect let us look at a Selective Service form letter sent by the local board to the defendant. Here we find the local board affirmatively seeking the Defendant's reliance on their advice. We read:

"Whenever you are in need of Selective Service advice or information, call on or write to your local board. If neither is feasible, any other local board will be glad to help you." (Ex. 173)

This is general form letter "LB Ltr. 0-5" issued by Selective Service. A similar letter can be found issued by Local Board #16, Everett, Washington, on page 65 of Selective Service file #45-16-44-486.

The wording of such forms, of course, is not just mere verbiage. They are approved by the National Director of Selective Service and have *the force and effect of law*. (32 C.F.R. 1606.51)

The local board's duty to advise and aid a registrant can be seen in *Uffelman v. U.S.*, 230 F. 2d 297, 300, 301 (9th Cir. 1956); *U.S. v. Sutter*, 127 F. Supp. 109, 119 (D.C. Cal. 1954).

The wisdom and rationale behind this duty is sound. As was so aptly stated in *U.S. v. Scott*, 137 F. Supp. 449, 454 (E.D. Wis., 1956), the mere fact that the Regulations provide for appointments of advisors indicates that Selective Service does not expect the registrants to know the Regulations and cases interpreting them. That this indicated the

Government wanted to protect the rights of the registrants that were afforded them under the Regulations and the law.

In a recent conscientious objector case decided January, 1966, the Court verified this need when it stated, "It is always difficult to obtain counsel to defend an unpopular cause, especially in a time of active hostilities." *U.S. v. Mitchell*, 354 F. 2d 767, 769 (2nd Cir. 1966). The Court then went on to state that even counsel must have time to familiarize himself with the "various intricacies of the Selective Service law."

In conjunction with this we ask the Court to consider *Cox v. Wedemeyer*, 192 F. 2d 920 (1951), where the Ninth Circuit pointed out that draft registrants are "unskilled in legal procedure . . . and none of them represented by counsel." (922-923). Also compare *U.S. v. Craig*, 207 F. 2d 888 (1953), where the Second Circuit declared: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel (891)."

The appellant manifested his clear intention and desire of doing what was right in the eyes of Selective Service in order to have his conscientious objector claim honored. Indeed, he did what he could commensurate with the knowledge he had. If either the local board, or Hearing Officer, had advised the appellant of the Government's view toward his type of work, or at least referred him to an advisor or appeal agent for the answer, the appellant would have terminated his employment. (Ex. 153; T. 32) As indeed he did quit promptly upon learning that his religion considered such work improper. (T. 35; Ex. 55)

Refusal of the local board, and the Hearing Officer, to respond to a bona fide inquiry for advice is arbitrary and unfair. It is tantamount to entrapment and violates the appellant's rights under the due process clause of the Constitution.

II

THE APPELLANT WAS DENIED DUE PROCESS WHEN OSTENSIBLY DEROGATORY AND ADVERSE EVIDENCE WAS PLACED BEFORE THE APPEAL BOARD THAT HE WAS NEVER INFORMED OF NOR AFFORDED THE OPPORTUNITY TO REBUT.

On April 3, 1964, a minister of appellant's church mailed a letter directly to the Appeal Board, containing information which, unless clarified, was highly derogatory to the appellant. (Ex. 58) The letter concerned, among other things, the appellant's employment at Boeing. The very crux of the Government's alleged basis in fact. The letter provided:

"The Resume of the Inquiry of Mr. Kenneth Gerald Storey, Jr., Conscientious Objector, page 4, eludes to the assumption that I sanctioned Mr. Storey working on missiles either directly or indirectly. Neither the Radio Church of God nor I teach that anyone should work on anything even remotely connected to the military.

"All the details were not explained concerning his work. I was under the impression that the capacity of his work was for civilian rather than military purposes."

The minister did not send a copy to the appellant. The Appeal Board never informed him they received it. When the local board reviewed the appellant's request to reopen, they never notified him of it. The appellant, in fact, never knew of this letter. He was deprived of the opportunity to explain it and clarify its meaning. (T. 36, 37)

Here we have a letter which, without further clarification, leaves the impression that the registrant was a rebel regarding obedience to church doctrine, that he misstated certain facts, and that he was working at Boeing contrary to the teaching of the church. The appellant was and is readily able to explain away these misimpressions. (T. 33, 29-41; Ex. 90-92)

The right to be forewarned of any ostensibly derogatory information filed with the local board, and the opportunity to clarify the same is an integral part of a fair hearing.

In *Gonzales v. U.S.*, 348 U.S. 407 (1955) a registrant was not afforded the opportunity to rebut adverse evidence in the Department of Justice's recommendation to the Appeal Board. In reversing the conviction the Court commented:

Page 415, "Just as the right to a hearing means the right to a meaningful hearing, *U.S. v. Nugent; Simmons v. U.S.*, supra, so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendation and argument to be countered."

Page 416, "... the local board made use of evidence of which (the registrant) may have been unaware, and which he had no chance to answer; a prime requirement of any fair hearing."

A similar position was taken in the 9th Circuit case of *Chernekoff* 219 F. 2d 721 (1955). Here the Draft Board's file contained information of an apparent derogatory nature. The registrant never knew of this data being considered and never had a chance to explain the same.

The Court there stated very succinctly:

Page 723, "The fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, relevancy and significance. Otherwise such a hearing is in violation of the 'concept of ordered liberty'." (Cases cited.)

Chief Justice Warren recently spoke out on this very

subject. He expressed its importance and the intent of the Court to protect the right from "erosion." The Court's statements are found in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), in which it is stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (Cases cited) but also in all types of cases where administrative and regulatory actions were under scrutiny. (Cases cited)"

It is well founded that the use of this secret knowledge by the board, without affording the defendant the opportunity to rebut, is no technical irregularity. As Judge Learned Hand said, "It went to the very heart of controversy and vitiated the whole proceeding." *U.S. v. Cain*, 149 F. 2d 338, 342 (2d Cir. 1945) and cases cited therein. See also: *U.S. v. Toon*, 151 F. 2d 778, 780 (2d Cir. 1945); *U.S. v. Everngam*, 102 F. Supp. 128, 131 (S. D. W. Va. 1951).

Being deprived of an opportunity to clarify this matter for the Appeal Board, and to focus the local board's attention to his explanation on his request for reclassification, blatantly denied the defendant a fair hearing and consequently violated due process.

III

THE LOCAL BOARD MISINTERPRETED AND MISAPPLIED THE REGULATIONS WHEN IT CONSIDERED THE NEW INFORMATION, FILED BY APPELLANT, UNDER THE ERRONEOUS IMPRESSION IT HAD TO WARRANT THE AUTHORITY OF THE STATE DIRECTOR TO REOPEN.

After the appellant filed his Special Form for Conscientious Objectors, he was granted a personal appearance hearing before the local board. Subsequent to that hearing your appellant filed new information with the local board, to wit: That he was baptized (Ex. 121), that his continued working at Boeing was due to a misunderstanding between his minister and himself and that he had now terminated his employment at Boeing. (Ex. 55) Also, verification of said information was received from the appellant's attorney. (Ex. 46)

The local board considered the new information but refused to reopen the appellant's classification. It gave its reasons in a letter to his attorney in which it said:

"Serious consideration was given your request but it was their determination that no action would be taken as information submitted did not warrant requesting the authority of the State Director to reopen the classification." (Ex. 120)

(A) The Local Board Violated the Defendant's Right of Due Process When It Applied an Erroneous Rule of Law.

The regulation pertaining to reopening, 32 C.F.R. 1625.2, provides:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not con-

sidered when the registrant was classified which, if true, would justify a change in the registrant's classification ...

Now the standard for reopening a classification is clear. The standard is, "Will the new information justify a change in the classification," not "Will it warrant requesting the authority of the State Director to reopen it."

It is impossible to determine what type or quantity of new information that the local board felt was needed to "request the State Director to reopen." But regardless of whatever it was, it is clear that the local board considered the appellant's new information under an erroneous impression as to the existing law.

The power of classification is exclusively vested in the local boards, subject only to the right of appeal. (50 U.S.C.A., App., Sec. 460(b)(3); 32 C.F.R. 1622.1(c))

"Errors of law," however, must be rectified by the Courts, *U.S. v. Downer*, 135 F. 2d 521 (2nd Cir. 1943). This is exactly what the Courts have done.

In the 9th Circuit case of *Stain v. U.S.*, 235 F. 2d 339 (9th Cir. 1956), a registrant filed his Special Form for Conscientious Objectors after his physical was taken, but before the Induction Notice was issued. The local board ruled not to reopen the classification on the erroneous grounds that the form was filed after the physical had been taken.

The Court declared the Induction Order invalid and stated:

Page 343, "We hold that the procedure followed by the board, in arriving at its ruling denying the Petition to Reopen and Reclassify, was illegal and deprived appellant of due process of law and that he was prejudiced thereby."

In another case the registrant submitted a ministerial certificate and two affidavits. The board refused to reopen

his classification on the grounds that Jehovah's Witnesses were not a recognized church. The court labeled this an "erroneous theory" and stated:

Page 424, "Since the board's refusal to reopen and consider the defendant's classification was founded upon this erroneous theory, a belief of the board members, the board's orders to the defendant . . . was a nullity." *U.S. v. Henderson*, 223, F. 2d 421, (7th Cir. 1955).

In *U.S. v. Kose*, 106 F. Supp. 433, (D.C. Conn. 1951), the local board denied a registrant's ministerial claim. The majority of the board admitted they did not act upon the definition of a minister as stated in the Act. In discharging the defendant it was said:

Page 435, "When it is questioned in a criminal proceeding, however, it is open to the defense to show if the board had an erroneous interpretation of the law in that respect in arriving at its conclusion. . . . There was *evidence* before them on which they *might have determined that he was not a minister*, but since they were not acting on a proper interpretation of the rule to be applied, we cannot tell . . . whether they would have arrived at the same conclusion." (Also see *U.S. v. Kezmes*, 125 F. Supp. 300 (D.C. Pa. 1954). (Emphasis ours.)

(B) The Local Board's Relinquishment of Its Right to Reclassify to the State Director Violated Its Statutory Duties.

In misinterpreting and erroneously applying the law in the manner in which they did, the local board also admittedly abdicated its discretionary duty of reclassification to the State Director.

In *Ex Parte Asit Ranjan Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944), a writ was granted. The Court stated on page 857, "And the State Director is not empowered under the

Act to promulgate rules or regulations nor to substitute his judgment for that of the local or Appeal Boards."

In *U.S. v. Cain*, 149 F. 2d 338, (2 Cir. 1945), the Court reversed an order where a writ had been denied. It appeared the local board had made use of a report by a panel of experts. The opinion, by Judge Learned Hand, held that such use must be a restricted one, that "... they must not be made a substitute for the boards themselves." (Page 341.) The Court concluded that the form of the recommendation made it improper for the board to act upon, that "... it was a decision upon the very issue to be decided." (Page 341.)

In *Eagles v. Samuels*, 329 U.S. 304, 315 (1946), our argument by analogy is further supported. There, the Court stated:

"It is plain that the local boards and the Boards of Appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10 (a) (2.)"

Therefore, the order to report on which the conviction is based was not in conformity with the established administrative process but was "outside" the administrative process. Compare *U.S. v. Peterson*, 53 F. Supp. 760 (D.C. Cal. 1944), where, in this very early statement on the subject by Judge St. Sure the law was so stated (page 762), this holding never being criticized by any of the many hundreds of subsequent draft cases. Also see *Knox v. U.S.*, 200 F. 2d 398, 401 (9th Cir. 1952).

(C) When The Local Board Fails to Exercise A Discretionary Function It Is Not Within the Power of the Court To Exercise That Function For Them.

It is not the contention of your appellant at this point, that the local board abused its discretion in not reopening. Indeed, how could it abuse its discretion when it never

properly considered the question in issue? Our contention is that it did not properly evaluate the appellant's new information because it was under an erroneous impression of law.

What then is the result? What would the board have decided if it did consider the merits of the appellant's request? Would they have reopened?

The answer is, we don't know! The Government has the burden of proving the appellant guilty beyond a reasonable doubt. Therefore, we certainly cannot simply conclude that they would not have reopened.

Cases have considered this general principle of law. The conclusion of them is that it is for the local board to decide and not the Court. Therefore, a Motion for Judgment of Acquittal is in order.

It is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). See also *Austin v. Jackson*, 353 F. 2d 910, 912 (4th Cir. 1965).

We also read in *Stain v. U.S.*, 235 F. 2d 339, 343 (9th Cir. 1956):

"We are not holding that the board could, or could not, have determined from the evidence that there was a basis in fact for the denial . . . that question was one that the board should have answered but it did not." The court declared the Induction Order invalid. Also see *U.S. v. Romano*, 103 F. Supp. 597, 600 (S.D.N.Y., 1952).

In applying an imaginary rule as they did, the appellant was deprived of the right to appear before the local board.

orally discuss and explain his evidence in detail, and of having the board personally evaluate the sincerity of his changed position. This would also include the special appellate procedures afforded a conscientious objector. (*Shepherd v. U.S.*, 217 F. 2d 942 (9th Cir. 1954); 32 C.F.R. 1625.11; 1624.2; 1625.13; 1626.25; 50 USCA App. Sec. 456(j)).

IV

THE LOCAL BOARD ACTED ARBITRARILY AND WITHOUT A BASIS IN FACT WHEN IT REFUSED TO REOPEN THE APPELLANT'S CLASSIFICATION AFTER RECEIVING NEW INFORMATION REGARDING A CHANGE IN HIS STATUS.

The Selective Service regulations provide that no classification is permanent. (32 CFR 1625.1) They also establish the basis for reopening a classification. The grounds are found in 32 CFR 1625.2 which provides in part:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification . . ."

There are two elements. First, the information must not have been previously considered; the second, if true, that it would justify a change in the classification. Are these two elements fulfilled in your appellant's case?

Let us first consider if facts not previously considered were filed.

While working at Boeing the appellant embraced the principles of conscientious objection. (Ex. 155, 156) He filed his conscientious objector form. His personal appear-

ance hearing was held at the local board on May 20, 1963. The local board classified him I-A and he appealed. Between the time of the appellant's appearance before his local board on May 20, 1963 (Ex. 20), and the local board's convening to consider his new information on June 15, 1964 (Ex. 120), your appellant filed the following:

Written information (1) that he had quit his job at the Boeing Company (Ex. 55); (2) that his employment at Boeing, after embracing the principles of conscientious objection, was due to a misunderstanding between his minister and himself (Ex. 55) and (3) that he had become a baptized member of the Church of God. (Ex. 121)

As the record will conclusively bear out, this information was filed subsequent to the May 20th meeting of the appellant's local board. So the first element for reopening is met.

Now let us consider, assuming this information to be true, if it would justify a change in the appellant's classification.

Let us recall that appellant was classified I-A-O by the Appeal Board. Also, as Point VI of this brief clearly develops, the only ostensible basis for this classification was the fact that the appellant was working at Boeing. The Government contended that this was defense work.

The information filed then, showed the changed attitude of appellant toward "defense work." It showed a change in the willingness to perform the type of work that the Department of Justice considered as defense work. In other words, there was a change in the very circumstances upon which the Government is attempting to predicate its basis in fact. As can be seen, the basis in fact then actually no longer existed. And if the local board had reopened and given appellant his right to further explain this evidence (32 CFR 1624.2) they would have learned that he transferred to

working on civil aircraft as long ago as November 21, 1963. (T. 33, 34)

The board would have also further learned, had they reopened, and given appellant the opportunity to explain the evidence, a full explanation of the misunderstanding between the minister and himself that resulted in his working at Boeing after becoming a conscientious objector. (T. 33)

The fact of appellant's baptism was indicative of his sincere noncombatant convictions, as it showed his further adherence to the doctrines taught by his church — one of which was opposition to noncombatant duty. (Ex. 121)

It would appear to be clear, that as the foregoing facts struck right at the heart of the Government's alleged basis in fact, that these facts would justify a change in the appellant's classification. Both elements of the regulation pertaining to reopening having been met then, it is respectfully submitted that it was prejudicial error for the local board not to do so.

The counsel for appellant wants to clarify, however, that he is not contending that the local board had a duty to "reclassify" appellant. That's for the board to decide. He does contend, however, that the local board did have the duty to at least "reopen" appellant's classification, grant him the required hearing (32 CFR 1624.2) so he could discuss the new information and the board could determine the sincerity of his attitude.

The failure of the local board to at least "reopen" has been considered in many cases.

A case on this point is the 9th Circuit case of *Stain v. U.S.*, 235 F. 2d 339 (9th Cir. 1956). There the registrant was classified I-A. He subsequently filed a Special Form for Conscientious Objectors. The board refused to reopen his classification. In reversing his conviction the Court stated:

Page 342, "Under the Regulations (Sec. 1625.4), if, in the local board's opinion, his filled-in Form 150

contained information in addition to that considered when appellant was classified I-A and/or "new facts," which presented a prima facie case for a conscientious-objector classification, the local board should have reopened the record *for the determination* of whether appellant was entitled to the change requested." (Emphasis ours.)

Also in accord is *Brown v. U.S.*, 216 F. 2d 258, (9th Cir. 1954) in which it was stated:

Page 260, "If a change of status *was declared*, it was the *duty* of the local board to take it into consideration and to classify him in the light of the new evidence presented." (Cases cited.) (Emphasis ours.)

As also provided in *Townsend v. Zimmerman*, 237 F. 2d 376, (6th Cir. 1956), on page 377:

"Though the language in the regulation is permissive merely that does not mean that a local board may refuse to open arbitrarily, but requires it to exercise sound discretion. That, in turn, requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a rationale basis on which to put decision."

See also *Schuman v. U.S.*, 208 F. 2d 801, 804 (9th Cir. 1953); *U.S. v. Peebles*, 220 F. 2d 114, 118 (7th Cir. 1955); *Taffs v. U.S.*, 208 F. 2d 329 (8th Cir. 1953); *U.S. v. Hagaman*, 213 F. 2d 86 (3rd Cir. 1954). For a well-written general discussion of Dickinson and Estep see *Batterton v. U.S.*, 260 F. 2d 233, 236 (8th Cir. 1958).

It has been further established that the local board needs a basis in fact to justifiably refuse to reopen a registrant's classification.

As provided in the case of *U.S. v. Ransom*, 223 F. 2d 15, 17 (7th Cir. 1955):

"The local board should not be able to escape the requirement of a basis in fact by simply refusing to re-

open a registrant's file and consider it further. If a registrant makes a prima facie showing of right to a new classification, the board cannot refuse to give it to him unless it has at least a basis in fact for that refusal. We regard this as a necessary corollary to, if not the same as, the rule laid down in the *Estep* and *Dickinson* cases, *supra*.

"If a registrant presents a prima facie case for a new classification, the mere fact that his file has previously been closed is not a basis in fact for refusing the requested classification. When such a prima facie case is presented and the board has no basis for refusing the requested classification, it must investigate further. If further investigation fails to disclose any basis for refusing the registrant's requested classification, it must be granted."

See also *U.S. v. Scott*, 137 F. Supp. 449, 453 (E.D. Wis. 1956); *U.S. v. Hestad*, 248 F. Supp. 650, 654 (W.D. Wis. 1965).

That the appellant made out a prima facie case is readily demonstrable. For a capsule review of appellant's evidence substantiating his claim, see App. G and F.

This reopening of appellant's classification would have resulted in giving him the right of a personal appearance before his local board, the right to present further evidence to them (32 CFR 1624.2 (b)) and in the event they place him in an unacceptable classification, the right to a Special Appellate Procedure offered under Section 6 (j) of the Act and Section 1626.25 of the Regulations. See *Witmer v. U.S.*, 348 U.S. 375 for a more elaborate discussion of the rights that appellant was deprived of.

The undisputed effect of a registrant being denied a basic right was summarized in *Knox v. U.S.*, 200 F. 2d 398, 401, (9th Cir. 1952), in which it was stated:

"So far as we are aware it is the uniform view of the Courts passing on the subject that failure to accord

a registrant the procedural rights provided by the regulations invalidates the action of the draft board."

V

THE DEPARTMENT OF JUSTICE'S RECOMMENDATION TO THE APPEAL BOARD DENIED APPELLANT DUE PROCESS IN THAT IT WAS AN UNFAIR RESUME OF THE ORIGINAL HEARING OFFICER'S RECOMMENDATION, AND THE ORIGINAL HEARING OFFICER'S REPORT WAS ARBITRARY, CAPRICIOUS, AMBIGUOUS AND UNFAIR.

The original Hearing Officer's report found the registrant to be sincere. It provided "The registrant appeared to be sincere in his representations as to his religious training and belief." (App. B, p. 4) It then went on and in the "Conclusion" provided:

"(T)here is nothing in registrant's situation that would *prohibit* his service in a noncombatant capacity *or in the area of assigned public work.*" (Emphasis added.)

After stating these conclusions the Hearing Officer continued under the "Recommendation" portion of his report:

"Based upon the conclusions reached as the result of this hearing, it is recommended that the registrant's appeal be allowed in part and that he be classified as a conscientious objector to combatant military service, but that he *not be exempted* from noncombatant military service *or service of an assigned public nature* commensurate with the conclusions herein and above stated." (Emphasis added.)

The instructions from the office of the Attorney General, to the Hearing Officer, require that the "Hearing Officer may make one of three possible recommendations to the Department of Justice." The form of recommendation to be used

when a registrant has been found to be qualified for non-combatant duty is:

“The Hearing Officer recommends that the registrant be exempt from combatant training and service only, and if inducted into the armed forces he be assigned to noncombatant training and service as defined by the President.” (App. E, p. 17)

As can be seen, the Hearing Officer did not make such a recommendation.

The findings and conclusions of the Hearing Officer make it clear that he had some misconception or misunderstanding regarding the relationship of noncombatant service and work under the civilian work program in lieu of induction. (50 USC App. Sec. 456(j))

The recommendation was in fact repugnant. He recommended that appellant be *not* exempted from both non-combatant military service and service under the civilian work program. To put it in the affirmative, he recommended that appellant be *qualified* for both noncombatant service and service under the civilian work program.

It cannot be denied that the recommendation was at least ambiguous. The Department of Justice should have referred the matter back to the Hearing Officer for a clarification as to what was meant by the recommendation. (App. E, p. 18)

Now let us look at the Department of Justice's recommendation to the Appeal Board. How did they summarize this point? How did they resolve the ambiguity? They simply stated:

“He (the Hearing Officer) recommended that the registrant's conscientious objector claim be sustained as to combatant military training and service only.” (Ex. 78)

So the Department of Justice actually misquoted the

recommendation of the Hearing Officer. They omitted the latter part of the recommendation that the appellant "not be exempted from" or, in other words, that he be qualified for, the civilian work program. They actually gave a misconception of the recommendation.

Why did they do this? Either innocently or because the author of the resume recognized the ambiguity and did not want to confuse the Appeal Board.

What is the effect of this misquote of an ambiguous Hearing Officer's recommendation?

As was stated in *DeRemer v. U.S.*, 340 F. 2d 712, (8th Cir. 1965):

"There is no doubt that once the Department of Justice undertakes to summarize the contents of the Hearing Officer's report . . . it has the obligation to render a *fair summary* . . ." (Emphasis ours).

Certainly this truth could not be questioned.

An applicable comment is found in the case of *Manke v. U.S.*, 259 F. 2d 518, 524 (4th Cir. 1958). There the Department of Justice's recommendation to the Appeal Board stated that there was a division among the witnesses in regards to their views on the Defendant's conscientious objector beliefs. In fact, this was not true. The Court reversed and stated:

However, we find that there was a *lack of fairness* in the recommendation which was made to the Appeal Board. . . . (I)t would be unrealistic not to conclude that the Appeal Board . . . was influenced largely if not wholly by the recommendation of the Department of Justice. *Goetz v. U.S.*, 216 F. 2d 270 (9th Cir. 1954). Since the recommendation . . . was founded on a mistaken assumption of fact we hold that its consideration by the Appeal Board amounted to a denial of procedural due process. . . ."

A similar conclusion was come to in the case of *U.S. v.*

Everngam, 102 F. Supp. 128 (S.D. W. Va. 1951) where the Hearing Officer's recommendation denied the registrant's claim because he was a Catholic. The Court stated on page 131:

"The registrant is entitled to have a report and recommendation that is not arbitrary. Without it he is denied due process of law. Had such a report and recommendation been made, who can say that the . . . Appeal Board would not have made a different decision?"

The patent ambiguity in the original Hearing Officer's report to the Department of Justice, and the unilateral resolving of that ambiguity in favor of the Department, materially prejudiced appellant at a crucial point. In the case of the *U.S. v. Cain*, 149 F. 2d 338 (2nd Cir. 1945) the local board made use of a report and recommendation of an advisory panel. The recommendation contained improper matter. Judge Learned Hand said, on page 342:

"That was no technical irregularity of procedure; it went to the very heart of the controversy and vitiated the whole proceeding."

Also see *U.S. v. Balogh*, 157 F. 2d 939 (2nd Cir. 1947).

The recommendation of the Department of Justice to the Appeal Board was also unfair in that it cited the case of *U.S. v. Corliss*. It failed to mention that this was a Second Circuit, not a Ninth Circuit case, and therefore, not binding as law in the judicial district in which the board was sitting. They also omitted citing the Ninth Circuit case of *U.S. v. Schuman*, 208 F. 2d 801 which was contrary to *Corliss*. (Ex. 79, 80) This, thereby, gave the erroneous impression that the *Corliss* case was the law in the Ninth Circuit. (Further argument on this point from Point VI Sec. A is also applicable here.)

The recommendation was also unfair in implying that by the appellant's filing his conscientious objector claim after

his divorce, aspersions were to be cast on his sincerity. The divorce did not, in fact, make the appellant more eligible for the draft as suggested, inasmuch as he was always classified I-A. (Ex. 78, 79, 10) (Further argument on this point from Point VI A is also applicable here.)

VI

THE I-A-O CLASSIFICATION GIVEN APPELLANT BY THE APPEAL BOARD WAS ILLEGAL, ARBITRARY, CAPRICIOUS AND WITHOUT A BASIS IN FACT.

The registrant has clearly made out a prima facie case regarding the sincerity of his combatant and noncombatant beliefs. (App. G and F)

The Department of Justice found appellant to be sincere in regards to combatant service, but recommended that his claim for noncombatant service be not sustained. It based its recommendation upon four alleged bases in fact.

The sincerity of the registrant is not questioned. Therefore the issue is one of law—whether the alleged bases in fact are legally sufficient.

Counsel will now review each of the bases in fact advanced by the Government.

- (A) The Acquisition of the Registrant's Conscientious Objector Beliefs, Subsequent to His Divorce and the Passing of His Physical, Was Not A Basis in Fact to Justify His I-A-O Classification.

The Department of Justice attempted to refute the sincerity of appellant, by drawing attention to the fact that he filed his conscientious objector claim subsequent to being found physically acceptable and after he had been divorced.

There are four unimpeachable reasons why this cannot either legally or logically, rise to the dignity of a basis in fact.

(1) The Government cites the Second Circuit case of *U.S. v. Corliss* as authority for denying appellant his requested I-O classification and for granting him a I-A-O.

The first thing we must do is note what classification the registrant in the Corliss case received and the Court's rationale. There the registrant was classified I-A. It being suggested that the registrant's delayed filing of his conscientious objector claim manifested a motive of attempting to evade the draft at the last moment. The putting forth of a last ditch effort to clandestinely obviate his military responsibilities.

Could such an argument ever be applicable to justify the I-A-O (noncombatant) classification given appellant in this case. Can it be said that by virtue of your appellant's notorious motives they are going to "punish him" by keeping him out of the front lines? Such a conclusion would be illogical.

See Executive Order 128 which defines noncombatant service. (App. E, p. 15)

(2) The rationale of the Second Circuit Corliss case has been refuted by the Ninth Circuit and others. In the Ninth Circuit case of *Schuman v. U.S.*, 208 2d 801 (1953) we read the following:

Page 804, "We cannot find in the proceedings before the local board any affirmative evidence which controverts Schuman's claim. There are only the suspicions raised by the fact that Schuman did not begin his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out. As the Supreme Court has stated, 'When the uncontroverted evidence supporting a registrant's claim places him *prima facie* with the statutory exemption, *dismissal of the claim solely on the basis of suspicion and speculation* is both contrary to the spirit of the Act and *foreign to our concepts of justice*.'" (Emphasis ours.)

Page 805, "The length of time one has been *con-*

nected with a faith has no bearing upon whether one is entitled to exemption as a conscientious objector. The only question to be considered is whether the registrant has a sincere (i.e., 'conscientious' religious opposition to participation in war in any form. The Hearing Officer concluded that Schuman was 'sincere in his religious belief' but because he had not been 'sincere' long enough recommended that exemption be denied. This is but another example of relying upon suspicion rather than on affirmative evidence." (Emphasis ours.)

Also see *U.S. v. Peebles*, 220 F. 2d 114, 118 (7th Cir. 1955); *Taffs v. U.S.*, 208 F. 2d 329, (8th Cir. 1953); *U.S. v. Hagaman*, 213 F. 2d 86, (3rd Cir. 1954); *U.S. v. Simmons*, 213 F. 2d 901, 905-906 (7th Cir. 1954).

(3) Neither is an adverse implication logically justified from the fact that the appellant filed his claim after his divorce.

The appellant was classified I-A on July 7, 1958 (Ex. 10). He was married during November, 1960 (Ex. 74), but never requested a dependency or hardship classification on this grounds. It must be noted that from 1958, until April, 1964, when the appellant was classified I-A-O, he had always been classified I-A.

In other words, the appellant has always been eligible for induction. He never had a deferred or exempt classification because of his marriage. Therefore, logic dictates that as the dissolution of his marriage in no way affected his eligibility under Selective Service, a divorce would in no way motivate ulterior motives in filing the conscientious objector claim.

The rationale in *Schuman v. U.S.*, 208 F. 2d 801, 804 (9th Cir. 1953), just cited, and the other cases referred to, are equally applicable here as well.

(4) Counsel is firmly convinced that the utilization of

the rationale of Corliss by the Department of Justice, is highly prejudicial and unfair.

The reason being, that any time a registrant files his conscientious objector claim, it is always before or after some step in the Selective Service process of classification. The men register at the youthful age of eighteen years. This, in the vast majority of cases, is long before they embrace the principles of conscientious objection. The only exceptions being the youths who are reared in the fundamental peace churches.

As a consequence, whenever a registrant files his conscientious objector claim it is bound to be after filing his classification questionnaire. Then, of course, it is either "just before" receiving one document or another from Selective Service, or "just after" receiving such a document. We might continue on — the claim was filed "just before" receiving his notice to appear for his physical, or "just after" receiving his notice for a physical. The Department of Justice can, and has, used just about any such point as a pivot for the Corliss case.

(B) The Initial Statement by the Registrant That He Based Conscientious Objection on A Desire to Preach Does Not Suffice as A Basis in Fact on the Facts in This Case.

The only evidence of such a basis being suggested by the appellant is a mimeographed questionnaire furnished by the local board, on which the answers were typed in by the clerk. Said form being the purported answers to the questions as given by appellant during his personal appearance hearing. (Ex. 113)

It should be noted that appellant never made this statement as such, but stated that he had filed an application for admission to his church's theological school. (T. 37, 38, 39)

Also, that answers to the form questions were typed in by the clerk, and under the press of being before the local board, appellant never fully read the statement before signing it. (T. 38, 39; Ex. 61, 94)

Even aside from this, the attempt of the Government to rely on this point as a basis in fact discards any possibility for spiritual growth and Bible understanding in a registrant. It also absolutely and totally ignores the wealth and superabundance of other grounds subsequently stated by the registrant. (App. G and F; Ex. 59, 133-135, 145)

As stated in *Sicurella v. U.S.*, 348 U.S. 385, 391 as long as "the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act."

Also see *Parr v. U.S.*, 272 F. 2d 416, (9th Cir. 1959); *Kretchet v. U.S.*, 284 F. 2d 561, (9th Cir. 1960) and *U.S. v. Erikson*, 149 F. Supp. 576, (D.C.N.Y. 1957).

(C) Under the Facts in This Case, the Previous Employment by the Appellant at Boeing Did Not Constitute a Basis in Fact for a Denial of the I-O Classification.

The pertinent facts to be considered on this point are that the appellant, prior to understanding his church's teaching on the subject, concluded that his work at Boeing might be improper. He unhesitatingly, innocently and openly, upon first coming to his conscientious objector beliefs, forthwith so informed his local board. (Ex. 156)

He subsequently had a conversation with other church members who were employed at Boeing and was informed that in the eyes of the church such work was not improper. (T. 30, 31, 33, 46-48, 51, 52)

The appellant then wrote the local board and made in-

quiry as to whether or not Selective Service considered his work improper and expressly stated that he would quit if they did. (Ex. 153) No answer was ever received from the local board.

Appellant even transferred employment within Boeing from working on ground-testing material to drafting on non-combatant unarmed aircraft. (T. 33, 34, 43)

The registrant subsequently even made inquiry of the Hearing Officer and asked if his work at Boeing was improper and that he would quit if they considered it as such. The Hearing Officer only stated it was immaterial to him, and never referred the appellant to a Selective Service Advisor or an Appeal Agent. (T. 34, 50)

Subsequently a ministerial conference was held at the Headquarters of appellant's church. The conference was prompted by information that the appellant's local church had condoned its members working in what might constitute defense work. An edict was published that this was not the doctrinal position of the Headquarters church. (Ex. 55, 67, 68; T. 35, 36, 53, 54) Upon being informed of the decision of the Headquarters church, the appellant and others terminated their employment at Boeing. (T. 55)

The effect that working in defense work would have upon a conscientious objector's classification was recently considered in the case of *Harshman v. U.S.*, 372 U.S. 607 (1962).

In that case the Department of Justice also attempted to have a registrant classified I-A-O by virtue of his alleged participating in defense work. The Solicitor General of the United States requested that the Court remand the case to the District Court so the indictments could be dismissed. His recommendation was based on a "confession of error" by the Attorney General. (App. C). On page 11 of the Government's Brief it is stated:

“The statute leaves no room for a rule of law that willingness to engage in defense production is so incompatible with conscientious objection to military service that, despite unquestioned religious sincerity, a I-O classification may not be assigned to any person willing to work upon goods for the armed forces. By the same token, it is *impermissible to jump*, invariably and automatically, from evidence of willingness to work on war goods to the conclusion of lack of a sincere conscientious objection to noncombatant service.” (Emphasis ours.)

Let us apply this to the case before us. Where is the fact or facts that would logically lead us from the appellant’s temporary and previous employment at Boeing, to the “conclusion of lack of a sincere conscientious objection to non-combatant service?” Your counsel can find none of record. There are no facts to bridge the gap. The gap was merely leaped by the “impermissible jump” condemned as a matter of law by the Attorney General of the United States.

On page 12 of the Harshman brief, the Solicitor General went on to quote from the Attorney General’s Memorandum:

“Cases can be readily imagined in which the registrant’s beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption.”

Is this not one of the cases to be “readily imagined”? The appellant continued his employment at Boeing under a mistake of fact and a mistake of law. A mistake of fact as to how his church viewed such employment, and by being induced into a mistake of law as to how Selective Service viewed such work in relationship to qualifying registrants for the I-O classification.

The Solicitor General continued his quote from the Memorandum:

“The issue is generally whether the registrant is

sincere in his claimed beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive."

The Hearing Officer found the appellant to be sincere in the statement of his religious beliefs. (App. B, p. 4) In this case there is not even any "inconsistency" on the part of appellant. The appellant is not claiming a right to continue working at Boeing. He is not claiming he has a right to work in defense-related industry and still claim a I-O classification. To the contrary, he states that such employment is contrary to his religious beliefs. He claims he cannot conscientiously perform such work. And in accordance with these expressed principles, he terminated his employment at Boeing and subsequently refused defense-related work. (T. 36, Govt's. Ex. 2.)

The Attorney General admits that in certain cases a man can willingly and knowledgeably earn his livelihood and continue in some sort of defense work. Your appellant then is not even willing to go as far as the law will allow him. Certainly, if your appellant's case is not one that qualifies for a I-O, then it would appear that the Attorney General's Memorandum was for naught, and that the Department of Justice is right back making the "impermissible jump."

Consider also that no classification is permanent. (32 CFR 1625.1) And a registrant who engages in defense work could be given a I-A-O classification. Would it not then follow that, this classification not being permanent, circumstances could arise which would result in its being changed? And is it not feasible that one such change of circumstances would be a registrant's change of attitude toward defense work? His quitting defense work once and for all because of his religious convictions? If this were not the case then it would appear that a I-A-O classification, given because of previous defense work, is permanent. That once a registrant

has engaged in defense work he is forever barred from successfully requesting a conscientious objector classification. Such a result would neither be logical nor legal. And it is submitted that the same illogical conclusion is what the Government is attempting to foist upon appellant.

(D) The Hearing Officer's Charge that There Was Nothing in the Appellant's Religious Training and Belief that Would Exempt Him from Noncombatant Service was an Illegal Basis.

This subject was fully developed under Point VII of this brief, and is applicable here. Your Counsel respectfully directs the Court thereto.

VII

THE DEPARTMENT OF JUSTICE BASED ITS RECOMMENDATION TO THE APPEAL BOARD ON AN ILLEGAL BASIS WHEN IT STATED THERE WAS NOTHING IN APPELLANT'S RELIGIOUS TRAINING AND BELIEF THAT WOULD PROHIBIT HIM FROM SERVICE IN A NONCOMBATANT CAPACITY.

Previous, long-established policy of the Department of Justice was broken in this case. Ordinarily appellant was denied access to the Hearing Officer's recommendation to the Department of Justice. Customarily appellant would only receive a resume of the Hearing Officer's report from the Department of Justice. In this case, after being subpoenaed, the original recommendation of the Hearing Officer to the Department of Justice was entered into evidence by stipulation. (App. B)

The Special Hearing Officer specifically found "the registrant appeared to be sincere in his representations as to his religious training and belief." The Hearing Officer went

on to find "It is concluded that the registrant is in fact a conscientious objector to combatant military service based upon his religious training and belief." (App. B, p. 4) Therefore, we know that the basis of the Hearing Officer's recommendation is not based upon the disbelief of appellant or his insincerity.

The Hearing Officer went on and stated, "It is further concluded, however, that, *within the limitations of the registrant's religious training and belief*, such as not working in the area of blood transfusions in hospitals or on Saturdays, there is nothing in the registrant's situation that would prohibit his service in a noncombatant capacity or in an area of assigned public work." (Emphasis added)

The Hearing Officer is not questioning the sincerity of what the appellant believes. He is questioning the meaning, import, extent or "limits" of appellant's religious doctrine.

In short, the Hearing Officer is saying the religious doctrine or teaching that he sincerely believes in, is not of such a nature as would legally "prohibit his service in a non-combatant capacity."

On what religious grounds did appellant predicate his conscientious objection to noncombatant service? The numerous and varied grounds are summarized in Appendix G.

Consider also the constitutional provision of appellant's church, which he was found to sincerely adhere to. It explicitly considers unchristian bearing arms or coming under "the military authority." (Ex. 123 & 145)

Could it possibly be concluded that the foregoing is not sufficient religious grounds, from a legal point of view, upon which to predicate an objection to noncombatant duties? Doctors of Divinity would be hard put to make a stronger case.

The Hearing Officer committed an error of law when he attempted to evaluate and judge whether appellant's

religious beliefs were such as would constitute a basis for a I-O classification.

(A) The Department of Justice is Foreclosed from Evaluating the Scope of a Registrant's Religious Doctrines.

What test has Congress and the Supreme Court prescribed for conscientious objectors? What meaning have they subscribed to "religious training and belief." Section 6(j) of the Act, 50 U.S.C. App. section 456(j) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious training and belief* in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis ours)

The construction of the religious aspects have recently been conclusively determined in the Supreme Court case of *U.S. v. Seeger*, 380 U.S. 163, in which it was stated:

"Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the god of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and

excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

It has now been very clearly brought into focus that the issue before the Selective Service System and the Department of Justice is the *sincerity* of a registrant. And we have seen from the Hearing Officer's report, the appellant is sincere.

This was the view taken by the Court in *U.S. v. Jakobson*, 325 F. 2d 409, (2nd Cir. 1963) in which it was stated:

Page 416, "We cannot believe that Congress, aware of the constitutional problem, meant to . . . require lay draft boards and personnel of the Department of Justice to pass on nice theological distinctions between vertical and horizontal transcendence. See Mr. Justice Jackson, dissenting, in *United States v. Ballard*, 322 U.S. 78, 92-95, 64 S. Ct. 882, 889-890, 88 L.Ed. 1148 (1944)."

This conclusion was confirmed by the Supreme Court in the Seeger case, *supra*. The language here vividly points out the error of the Hearing Officer in the case before this Court. On page 747 of the United States Supreme Court Reports, Lawyers Edition, we read:

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' *or the truth of his concepts. But these are inquiries foreclosed to Government.* 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others.' Local boards and Courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' *Their task is to decide whether the beliefs professed by a registrant are*

sincerely held and whether they are, in his own scheme of things, religious.” (*U.S. v. Seeger*, 380, U.S. at 747). (Emphasis ours.)

The standard of *Seeger* has been applied in two subsequent cases. In *Fleming v. U.S.*, 344 F. 2d 912 (10th Cir. 1965) we find the Court upholding a registrant's views as satisfactorily fulfilling the religious requirement when it found that his beliefs were “in part at least based upon religious convictions” and where he had only “been influenced by religious training and belief.” See also *U.S. v. Stolberg*, 346 F. 2d 363 (7th Cir. 1965).

(B) A Recommendation of the Department of Justice to the Appeal Board Predicated on an Erroneous Legal Theory Vitiates the Entire Proceeding.

The recommendation of the Hearing Officer to the Department of Justice was incorporated into the Department of Justice's recommendation to the Appeal Board. (Ex. 78)

What is the effect of the Department of Justice wrongfully attempting to evaluate a registrant's religious beliefs? Perhaps the most often quoted case on this issue is *Sicurella v. U.S.*, 348 U.S. 385.

In the *Sicurella* case the registrant claimed a conscientious objector classification but stated that he was able to participate in war and use force in the defense of his ministry, kingdom interest and fellow brethren. The Department of Justice considered such religious beliefs as nullifying the registrant's claim and rendered an adverse recommendation. In reversing the Court stated on page 391:

“The report of the Department of Justice on the Appeal Board clearly bases its recommendation on petitioner's willingness to ‘fight under some circumstances, namely in defense of his ministry, Kingdom interests, and in defense of his fellow brethren,’ and we

feel that this *error of law* by the Department, to which the Appeal Board might naturally look for guidance on such questions, *must vitiate* the entire proceedings at least where it is not clear that the board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower Court cases taking this position and we believe that they state the correct rule." (Cases cited.) Also see *U.S. v. Jakobson*, 325 F. 2d 409 (2nd Cir. 1963) at page 416. (Emphasis ours)

Other cases in accord are: *Hinkle v. U.S.*, 216 F. 2d 8 (9th Cir. 1954); *Hacker v. U.S.*, 215 F. 2d 575 (9th Cir. 1954); *Goetz v. U.S.*, 216 F. 2d 270 (9th Cir. 1954); *Affeldt v. U.S.*, 218 F. 2d 112 (9th Cir. 1954); *Ashauer v. U.S.*, 217 F. 2d 788 (9th Cir. 1954); *Batelaan v. U.S.*, 217 F. 2d 946 (9th Cir. 1954).

In the 9th Cir. case of *Shepherd v. U.S.*, 217 F. 2d 942 (9th Cir. 1954) the Hearing Officer and Department of Justice based their recommendation to the Appeal Board on an erroneous view of the law. The Court stated on page 946:

"We think that a hearing before a Department, proceeding upon an erroneous theory as to what constitutes opposition to 'participation in war in any form,' is no better than no hearing at all."

In the case of *U.S. v. Everngam*, 102 F. Supp. 128 (S.D. W. Va. 1951) the Court was faced with an analogous situation. There the Hearing Officer refuted the registrant's claim because he was a Catholic and that his beliefs were opposed to the standing of the Roman Catholic Church on the question of warfare.

There the Court provided on page 131 that the "prosecution was bound to prove that such invalid report and

recommendation of the Hearing Officer . . . did not affect the decision of the Appeal Board, or any subsequent decision of the local board."

By virtue of the improper evaluation of appellant's religious beliefs the erroneous recommendation based thereon denied your appellant a fair hearing.

VIII

THE FAILURE OF THE DEPARTMENT OF JUSTICE HEARING OFFICER TO ADVISE THE APPELLANT OF HIS RIGHT TO AN ATTORNEY, AND TO REMAIN SILENT, WAS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

The violation of appellant's Constitutional rights under the Fifth and Sixth Amendments occurred at the outset of the hearing before the Special Hearing Officer for the Department of Justice. There is direct uncontradicted evidence, that the Hearing Officer did not advise appellant of his right to be represented by an attorney, to have an attorney or advisor present during the questioning, to remain silent or that whatever he said could be used against him. (T. 35, 50)

It is suggested that there is a direct analogy between the threatened wrongs in custodial interrogation by law enforcement officers and rights sought to be protected, on the one hand, and the hearing of a naive, religious youth in the office of an attorney acting as a quasi-judicial officer for the Department of Justice, on the other. Your counsel respectfully suggests that with the same rights being jeopardized, the demands for the same precautions are called for as were pronounced in the recent landmark decisions of *Escobedo v. State of Illinois*, 378 U.S. 478 (1964); *Miranda v. State of Arizona*, — U.S. —; 16 L ed 2d 694 (1966) and

Johnson v. State of New Jersey, — U.S. —; 34 U.S. Law Week 4592 (1966).

(A) The Prospective Aspect of *Miranda* and *Escobedo*, Announced in *Johnson v. State of New Jersey*, Does Not Bar Their Application to Appellant's Case.

The *Johnson* decision by its terms expressly authorizes prospective application of the *Escobedo* decision to appellant's case (34 LW at 4593). It provided that *Escobedo* would be applicable to all cases tried subsequent to June 22, 1964. The trial of appellant's cause took place December 6, 1965. (Transcript of Evidence, 12/6/65)

The *Johnson* case expressly limited application of *Miranda* to trials after June 13, 1966. Does this restriction then bar application of *Miranda*'s holdings and rationale to appellant's case? The answer is no, it does not. Not at least, insofar as appellant's right to be advised of his right to counsel and of his privilege against self-incrimination are concerned. The reason being, these are the holdings in *Escobedo*.

In other words, the *Miranda* case does not create these rights, but merely elaborates on them with *Escobedo* as their authority. Indeed, the protection of these rights formulated the heart of the *Escobedo* decision. At the very outset of the *Miranda* case the Court speaks about procedural safeguards that will protect an individual from incriminating himself. The Court then exclaims, "We dealt with certain phases of this problem recently in *Escobedo*." (16 L ed 2d at 704)

The decision then goes on to read, still referring to *Escobedo*, that "The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney." The Court then concludes on page 705:

"We have undertaken a thorough re-examination

of the Escobedo decision and the principles it announced, and we affirm it. That case was but an explication of basic rights that are enshrined in our Constitution — that no person . . . shall be compelled in any criminal case to be a witness against himself, and that the accused shall . . . have the assistance of counsel — rights which were put in jeopardy in that case through official overbearing.”

The Court in *Miranda*, further confirmed its applicability to *Escobedo* on page 706:

“It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution would not become but a “form of words,” . . . in the hands of Government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.”

So as to leave no doubt the Court continues on page 718 to emphasize the thrust of the *Escobedo* decision where it states:

“Our holding there stressed the fact that the police had not advised the defendant of his Constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S. at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision.”

The other aspects of the *Miranda* decision, such as the right of the suspect to be advised of his right to an attorney even though he is indigent, the more stringent rules for waiving Constitutional rights and certain other points, which were not raised in *Escobedo*, would apparently be barred. These barred points, however, are irrelevant to the successful application of *Escobedo* to the appellant's case.

Your appellant's case then, comes within the prospective application of *Escobedo* as its meaning is clarified in the *Miranda* decision.

(B) Summary of the Procedure Established by Selective Service and the Department of Justice for Hearings on Conscientious Objector Claims.

The administrative rules controlling the determination of conscientious objector claims are unique. The emotion generally involved in such claims — fervent, strong and prejudicial. The burden of proof imposed on a prospective conscientious objector — heavy. The legal penalties for failure — severe. The law regarding judicial review — stringent and limited.

The procedure established by Selective Service and the Department of Justice, regarding the hearings of conscientious objector claims, sets the stage for some of the very wrongs sought to be guarded against in Escobedo.

The point of time appellant's objection occurs — "the crucial period" — is at the hearing by the Special Hearing Officer for the Department of Justice. A brief review of the procedures leading up to and surrounding that hearing will aid in bringing the potential points of jeopardy in true focus.

First, a registrant has a right to a hearing before his local board. He has no right, however, to have anyone appear with him, and is expressly barred from having anyone represent him acting in the capacity of legal counsel. (32 CFR 1624.1) This hearing generally only lasts 10 or 15 minutes. In the majority of cases the local board denies the claim. The registrant is then compelled to appeal.

If an appeal is filed the case is forwarded to the Appeal Board. The Appeal Board will first tentatively determine if the registrant is entitled to his conscientious objector classification. If not, the Appeal Board will then transmit the file to the United States Attorney for the Federal Judicial District in which the Appeal Board has jurisdiction. This is for the purpose of securing an advisory recommendation from the Department of Justice [32 CFR 1625 (a)(b)].

The United States Attorney will cause an investigation of the registrant's background to be conducted by the Federal Bureau of Investigation. (App. E, p. 10)

The Department of Justice will then assign the file to a Hearing Officer for the purpose of holding a hearing on the character and good faith of the registrant. (32 CFR 1626.25 (d)) Hearing Officers are licensed attorneys and are appointed by the Attorney General. (App. E, p. 10)

The Hearing Officer then sets a date for the hearing. He mails a notice of the hearing to the registrant (App. D, App. E, p. 12) along with a resume of the F.B.I. investigation. The Hearing Officer is instructed that the F.B.I. report is not a part of the registrant's Selective service file. (App. E, p. 11) The resume received by the registrant does not set forth the names or addresses of the witnesses. (Ex. 84-100)

These hearings are held right in the attorney's office or in office space furnished by the Department of Justice (App. E, p. 19), generally the former. No court reporter is present. The Hearing Officer only relies upon his memory and any hand-written notes he may make of the hearing. (App. E, p. 19)

A registrant does have a right to have an attorney or advisor present during this hearing. He also has a right to call witnesses, who will appear voluntarily, but these can be excluded from the hearing at the discretion of the Hearing Officer. App. E, p. 13) A brief, but covert reference to these rights is made in the "Instructions to the Registrant." (App. D, p. 9) It should be noted, however, that nowhere is the registrant advised of his right against self-incrimination.

The hearing itself is to be informal, nontechnical and flexible. The ordinary rules of evidence do not apply. The conduct of the hearing is at all times under the direction and control of the Hearing Officer. App. E, p. 12) He is the sole judge in the matter of choice and method to effectuate the

desired result. No one has a right to object to any question or make any argument concerning any phase of the proceeding. (App. E, p. 13)

The registrant has the burden of proof. Each registrant is considered available for military service until he has clearly established his ineligibility [32 CFR 1622 (1)(c)]. The Hearing Officer then prepares and forwards his recommendation to the Department of Justice. Another hard rule generally followed is that the registrant has no right to view the original recommendation of the Hearing Officer. The Department of Justice in turn furnishes its recommendation to the Appeal Board, which includes a resume of the FBI report, a resume of the Hearing Officer's report and his recommendation [32 CFR 1626.25(d)].

It is customary practice, however, that the Department of Justice not only furnishes a "recommendation" but a summary of the facts sustaining their view, and a brief of the case law in their favor. (Ex. 74-82) The resume of the Department of Justice is not binding on the Appeal Board. It is obviously, however, highly persuasive.

The registrant is then furnished with the recommendation of the Department of Justice and given 30 days in which to file a written rebuttal with the Appeal Board [32 CFR 1626.25(e)]. The registrant has no right to appear before the Appeal Board in person or by counsel, to present evidence, ask questions, or to be interviewed. The Appeal Board then decides and classifies the registrant. This procedure is a trial de novo and not a mere review of the local board's classification.

If the Appeal Board's vote is unanimous the decision is final [32 CFR 1626.26(b)]. If the classification is incompatible with the registrant's religious beliefs the result could lead to an indictment.

In the event of indictment, the registrant finds himself

in an adversary proceeding and a unique situation. A situation in which he is prosecuted by the very department that investigated his case and questioned him. It is the very answers he gave in response to the Hearing Officer's questioning that are used as a basis for prosecution.

The general view of the trial courts being, that all the prosecution need do is submit the Selective Service file into evidence, show the registrant refused induction, and they have proved a *prima facie* case. *U.S. v. Collura*, 139 F. 2d 345 (2nd Cir. 1943).

The Court has been adamant in their ruling that they cannot weigh the evidence. That the Selective Service board's findings are final, although they may be erroneous, so long as they have a "basis in fact." *Estep v. U.S.*, 327 U.S. at 122. A "basis in fact" meaning as little as a mere adverse first impression gained by the Hearing Officer, during a twenty minute questioning period or so, in surroundings absolutely foreign to the registrant. As the Courts have restated many times, the review allowed the Courts in conscientious objector cases is the "narrowest known in law" (*DeRemer v. U.S.*, 340 F. 2d 712, (8th Cir. 1965)).

(C) The Inalienable Constitutional Rights Sought to be Protected by Escobedo and Miranda Are Violated in the Administrative Proceedings Concerning Conscientious Objectors.

The prevailing policies and procedures of Government officials in questioning citizens transgressed the Constitutional rights of Escobedo and Miranda. It was the threat that these policies and procedures would relegate the rights in question to "empty words" that motivated the Court to establish the safeguards it did. These very same forces are active and ominously present in the proceedings under which a conscientious objector must seek to establish his claim.

One of the factors jeopardizing a citizen's rights, and sought to be guarded against in Escobedo and Miranda, was the danger inherent in "custodial interrogation."

The Court stated in the Miranda decision on page 706:

"Our holding . . . briefly stated (is) . . . the prosecution may not use statements . . . stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (16 L ed 2d 694)

The Court then continues and describes what it means by "custodial interrogation." It is defined as:

"Questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way.*" (Emphasis added)

This definition of "custody" was repeated by the Court in at least two other places. (pp. 725, 726)

The Court then clarifies the much discussed enigma in the Escobedo case, by explaining that "being deprived of freedom of action in any significant way" is what was meant when they spoke of the "investigation which had focused on an accused." See *U.S. v. Fogliana*, 343 F. 2d 43, 46 (9th Cir.)

Was appellant "deprived of his freedom of action in any significant way" when appearing before the Hearing Officer? The answer is emphatically yes! How? Not by the power of a subpoena, but by a much more powerful process. The appellant was under the compulsive threat of forfeiting every right to acquire his conscientious objector claim. Under the threat of bringing down the crushing rule of "failure to exhaust administrative remedies."

What is the result of the "failure to exhaust" rule? If a registrant is prosecuted for refusing induction he could be

absolutely barred, by this generally applied rule, from presenting any evidence proving an otherwise successful defense or right to his claimed classification. [See head quotes cited in Modern Practice Digest, Vol. 3, Key No. 20.9(2)]

Under the fear of such reprisals the registrant's appearance is as compulsive as the act of any suspect being taken into police custody. One submits under the fear of physical violence. The other under the fear of assured incarceration.

Further, let us review the "notice" of the hearing sent to a registrant. (App. D, p. 7) The first thing that meets the registrant's eye is "Department of Justice, Washington, D.C., NOTICE OF HEARING." Then he reads "You are hereby notified that before the undersigned Hearing Officer at . . . , a hearing, at which you are *requested* to be present, will be held by the Department of Justice . . ." (Emphasis added) The last thought he is left with in the "Instruction to Registrants," is "Failure to comply with these instructions may result in the termination of the proceeding."

That a Governmental "request" calls for equal dignity with an "official demand" is verified by weighty authority. In *U.S. v. Minker*, 350 U.S. 179 (1956) an immigration officer issued a subpoena for the defendant to appear and give testimony at the office of the Department of Immigration. The subpoena was in fact of no validity itself. No penalty could be incurred for contempt without a judicial order of enforcement.

Justice Frankfurter could see the practical coercive power this would have upon lay individuals, and in delivering the opinion of the Court he stated on page 187:

"True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their

natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation."

This overbearing effect of receiving Government documents by the uninitiated was also recognized in *U.S. v. Scott*, 137 F. Supp. 449, (E. D. Wis., 1956). There the registrant signed a form in which he volunteered for the civilian work program. He just assumed he was "forced to take the job." In holding that this did not constitute a waiver the Court stated on page 455:

"The defendant might also strongly urge that he signed this application under 'duress.' The final action by the draft board . . . had some coercive tendency either because of ignorance on the part of the defendant of his rights or his natural respect for what appeared to be an official command."

Another threat sought to be protected against in *Escobedo* and *Miranda* was the involuntary statement through "official overbearing" (p. 705) in the "Government established atmosphere." (p. 719) (16 L ed 694)

The Court emphasized clearly that compulsive incrimination by brutality was the exception today. That it was the psychological and mental pressures rather than the physical that were the danger. They recognized the truth that "blood was not the only hallmark of unconstitutional inquisition." (pp. 708, 709) It further stated that the presence of an attorney would tend to alleviate this threat.

As we have seen, during the Hearing Officer's hearing, the registrant does have a right to have an attorney present during the hearing, and the right to have witnesses on his behalf. However, all the witnesses may be excluded at the discretion of the Hearing Officer. (App. E, p. 13)

Further, of what value is the right to have an attorney, when in the overwhelming majority of the cases the regis-

trant does not, in fact, know of this right. The right is not to be found in the Selective Service Regulations or in the underlying Congressional Act. The one reference in the Regulations touching upon the point tells the registrant "he has no right to an attorney." [32 CFR 1624.1 (b)]

The brief reference in the "Instructions to the Registrant" squelched among all the "whereases" and "aforesaid" does not even colorably comply with the Government's duty in this regard. (App. D, p. 9) Further, these instructions are sent out at least 10 days before the hearing (App. E, p. 12), and the brief reference is more deeply obscured in a maze of papers including the notice of hearing, the resume of the F.B.I. investigation, and the instructions themselves.

No reference whatsoever is made to the registrant's right against self-incrimination, or that whatever he says could be used against him in any subsequent prosecution.

Then, even if the registrant does not have an attorney present, the Hearing Officer is in complete charge of the hearing. He can ask whatever questions he pleases. Neither the attorney nor the registrant has the right to make any objection whatsoever. (App. E, p. 13) Any attempt to do so could terminate the entire proceedings. (App. D, p. 9)

The hearing is truly dominated by the Hearing Officer in every respect. More so than the interrogation by police officers. As Miranda so vividly points out, the police must resort to trickery and skulduggery in achieving answers. Not so with the Special Hearing Officer. He need only ask whatever question suits him. His "suspect" must come forth with the answer without hesitancy or balking. Any such response, or refusal to answer the most intimate question, could result in incurring the Hearing Officer's displeasure. The result — a weighty, if not conclusive finding of insincerity.

The most current, and strongest case, known to counsel concerning a registrant's right to an attorney during the

Selective Service process is found in *U.S. v. Wierzychuchi*, 248 F. Supp. 788 (W. D. Wis., 1965).

Appellant, and other registrants, are thrust into an analogous atmosphere of official overbearing when they are compelled to attend the hearing for the Special Hearing Officer. It is true that the atmosphere is not the dank darkness of a police interrogating room arranged to break down the hardened criminal. But we must remember, that in a conscientious-objector hearing we are not dealing with a hardened criminal. Rather a reserved, naive, youthful religious individual.

An individual that is impressed and awe-struck at the dignity of officialdom. An individual whose will, by the very essence of the claim he is professing, is in subjection to higher authorities. An individual who is apprehensive and defensive, who respects and many times fears the austere, dignified atmosphere of an attorney's office. An individual who attends the hearing fraught with a lifetime of teaching, right and wrong, about the grilling capabilities of attorneys. All the pressures of which subjugate his will to the keenness of the attorney who is assigned to probe, unrestrictedly, the registrant's innermost subjective thoughts.

Experience in attending these proceedings has shown your counsel the effect such surroundings have on a conscientious objector. More than once the registrant will make a remark or give an answer which is unintentionally incorrect and harmful to him. When asked why he said it, the inevitable answer is, "I don't know. I was just confused by the question and what he was getting at."

At first impression does the analogy between the typical interrogating room and the Hearing Officer's office appear to be an extended analogy? The Honorable Justice Black did not believe so. In *U.S. v. Minker, supra*, he himself drew a like analogy. Please see Appendix H for the imperative quote.

The Court in *Miranda* made clear that the privilege against self-incrimination is not limited to criminal Court proceedings. It commented emphatically:

“Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal Court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves.” (p. 719)

The Court went on to say that it was necessary in *Escobedo* to insure that what was proclaimed in the Constitution did not become a “form of words in the hands of *Government officials*” — not just police officers.

As was cited from the *Wan* case “compulsion renders involuntary either in judicial proceedings *or otherwise*.” (p. 717)

Counsel wants to make clear, that if the right against self-incrimination is not protected at this point for a conscientious objector, it is lost forever. It is at this point that the damage, if any, is done. It is at this point the rights are violated. It is at this point the right has meaning.

If anyplace, it would be at the trial that the registrant is desirous of testifying. And it is there where judicial cases would silence him. If the right is not granted him at the Hearing Officer's hearing, then it is merely an empty shell thereafter.

The only protection that can be afforded the registrant is his constitutional right to remain silent. To remain silent without an adverse inference being drawn. And of what value is this right to a youth of draft age, unless he is advised of it in the first instance by the Hearing Officer. And even then, unless perhaps by his own attorney at the appropriate times during the hearing. Any testimony elicited in viola-

tion of the safeguards announced in Escobeda and Miranda should be held to taint the findings of the Appeal Board.

If these rights cannot be exercised before the Hearing Officer, then the registrant will be compelled to weave the noose that will merely be placed around his neck at the trial of his cause. The trial will then only become one more step in the formality preceding execution of the potential penalties.

The compelling need of adequate warning regarding the privilege against self-incrimination and the right to counsel, emphasized in Escobedo, is likewise applicable here:

“Escobedo explicated another facet of the pre-trial privilege . . . without the protections flowing from adequate warnings and the rights of counsel, ‘all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.’” (Cases cited) 16 L ed 2d at 719.

The fact that the particular application of the rights in question have not been customarily exercised in this respect before, is immaterial. As stated on page 706 of *Miranda* the Court referred to the flexible principles of our Constitution and stated:

“... our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.”

IX

THE COURT ERRED IN SUSTAINING THE GOVERNMENT'S OBJECTION TO THE INTRODUCTION OF TESTIMONY FROM CERTAIN OF APPELLANT'S WITNESSES.

Please see Specification of Errors Point III for summary.

The objection to Gerald Lindberg's testimony was improperly sustained, as "heresay" was not a proper ground. (46, 47) As the witness would have testified to the fact of the conversation and not the truth thereof.

Second grounds of it not being in the record was improper as the testimony was only to supplement the record and not submit new evidence in direct support of appellant's claim. (T. 49-51)

The sustaining of the objection to the testimony of Donald Roulette was improper for the same grounds as above-mentioned.

The objection to the testimony of Valdon White was improperly sustained in that the proffered testimony was obviously relevant.

As the sustaining of the objection constituted plain error to the prejudice of appellant he is entitled to a new trial.

CONCLUSION

Due to the admitted sincerity of the appellant in conjunction with the patent violations of due process, justice truly requires that the judgment of the District Court be reversed.

Respectfully submitted,

RALPH K. HELGE

285 W. Green St., Suite 205

Pasadena, California 91105

Area Code 213, SY 5-5525

Attorney for Appellant

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH K. HELGE, *Attorney*

APPENDIX A

Index of Exhibits in Record

(Reporter's Transcript of Evidence of Dec. 6, 1965)

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(Reporter's Transcript of Evidence January 21, 1966)

Defendant's Exhibit No. A-1

Marked for Identification	2
Received in Evidence	3

APPENDIX B
(Defendant's Exhibit A-1)

REPORT OF HEARING CONDUCTED BY THE DEPARTMENT OF JUSTICE PURSUANT TO SECTION 6(j) OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

In re: KENNETH GERALD STOREY, JR.
 S. S. No. 45 6 40 53 — Conscientious Objector

DATE OF GIVING NOTICE OF HEARING:

One copy each of Resume and Instructions to Registrants were sent to the registrant with Notice of Hearing on November 21, 1963.

HEARING HELD PURSUANT TO NOTICE:

At 1018 Northern Life Tower, Seattle, Washington, on December 4, 1963, at 4:00 P.M. The registrant appeared personally and in company with one Gerald A. Lindberg, of 31452 13th S. W., Federal Way, Washington.

NATURE OF CLAIM FOR EXEMPTION:

Claim is for exemption from both combatant and non-combatant service in the armed forces based upon registrant's training and religious belief and conviction.

STATEMENT OF FACTS:

Gerald A. Lindberg, who accompanied the registrant, identified himself as being an active member of the Radio Church of God, which was the church in which registrant was actively affiliated, and was familiar with the teachings of this church and with registrant's activities in it. Lindberg stated the Radio Church of God held to the belief that their members should not serve in the armed forces in either a

combatant or noncombatant capacity; that they can, however, serve or be assigned to work of a public nature unconnected with military activity. Lindberg stated that he believed the registrant fully subscribed to the teachings of this church.

The registrant, Kenneth Gerald Storey, Jr., stated that he was born in Spokane, Washington, January 5, 1940, and presently resided at 4410 South 176th in Seattle, Washington. The registrant stated, "I am not a citizen of this country — I am a citizen of the Kingdom of Heaven — I am an ambassador of God." He stated further that the Ten Commandments prohibit killing and therefore he could not possibly affiliate with the armed forces in any manner.

The registrant stated that there was nothing in his religious training and belief, however, that would prevent his going into a work program of a public nature provided it was not connected with the military, observing, however, that he could not work in a noncombatant military facility without doing violence to his religious belief. The registrant stated that he was employed by the Boeing Airplane Company in Seattle, working at the Transport Division of that company in Renton, Washington. He stated that, while he had been working on the missile program in the area of electronic communication, that he never at any time considered himself a builder or worker on the missiles. His present assignment at the Boeing Airplane Company is not connected with the missile program, and the registrant appeared to be embarrassed and uncertain in his justification of his previous assignment in the missile area of the Boeing Company.

The registrant stated that he was an active member in the Radio Church of God; that he had intended to register in Ambassador College, maintained by that church in Pasadena, but that because of overcrowded conditions they could not presently accept him as a student; that he did in-

tend to enroll, however, in another Radio Church of God college during the winter quarter of 1964.

The registrant stated that he intended to devote himself fully to church activity and work in the Radio Church of God and to ultimately enter the ministry when he had completed his schooling. The registrant observed that the teachings of his church would prohibit his work in a hospital which might bring him into contact with blood transfusions or work in any assignment that might require employment on Saturdays, the same being regarded by him as a holy day. The registrant appeared to be sincere in his representations as to his religious training and belief.

CONCLUSION:

It is concluded that the registrant is in fact a conscientious objector to combatant military service based upon his religious training and belief. It is further concluded, however, that, within the limitations of registrant's religious training and belief, such as not working in the area of blood transfusions in hospitals or on Saturdays, there is nothing in registrant's situation that would prohibit his service in a non-combatant capacity or in an area of assigned public work.

RECOMMENDATION:

Based upon the conclusions reached as a result of this hearing, it is recommended that the registrant's appeal be allowed in part and that he be classified as a conscientious objector to combatant military service, but that he not be exempted from noncombatant military service or service of an assigned public nature commensurate with the conclusions hereinabove stated.

JOHN D. McLAUCHLAN
Special Hearing Officer

APPENDIX C

OFFICE OF ATTORNEY GENERAL

WASHINGTON, D.C.

MARCH 12, 1963

Memorandum to Chief, Conscientious Objector Section,
Department of Justice.

Re Effect on claims for exemption from noncombatant service of willingness to perform defense work.

In two cases now pending before the Supreme Court of the United States (*Harshman v. United States*, No. 515, and *Parker v. United States*, No. 516), the recommendations of the Department to the Selective Service Appeal Board appear to be susceptible of an interpretation which would reflect an erroneous view of the law applicable to the above subject. The recommendations can be interpreted as implying that even if a registrant is sincerely and conscientiously opposed to noncombatant service, he cannot, as a matter of law, qualify for an exemption from such service if he is engaged or states that his beliefs would permit him to engage as a civilian in production of materials for the armed forces. I have been advised by the Assistant Attorney General in charge of the Office of Legal Counsel that this view of the law is not taken by your section or by his Office. However, in view of the fact that this question has been raised I wish to insure that all necessary action is taken to eliminate any possibility of misunderstanding that may have arisen on the part of the Department's personnel as to the proper legal standards in this regard.

In every case of a claim for exemption from noncombatant service, the ultimate issue is whether the registrant is "conscientiously opposed to participation in ° ° ° noncombatant service" within the meaning of 50 U.S.C. App.

§ 456 (j). This issue does not, of course, arise unless the registrant has established his eligibility for the lesser exemption from combatant training and service by demonstrating that he is "conscientiously opposed to participation in war in any form." In determining the genuineness and sufficiency under the statutory standards of a registrant's claimed beliefs, it is proper for consideration to be given to his attitudes and beliefs regarding participation in defense work as a civilian. Indeed, a registrant's willingness to earn his living by producing materials for the armed forces may of itself provide an adequate basis for concluding that the registrant is not "conscientiously opposed to participation in * * * non-combatant service." However, such evidence does not always or necessarily have that effect. Cases may be readily imagined in which the registrant's beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption. The issue is generally whether the registrant is sincere in his claimed beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive.

Please be good enough to inform the Selective Service System of the contents of this memorandum and request that agency to inform its appeal boards. Also, please take all action necessary to insure that Department personnel who are engaged in the processing of appeals in this type of case, including hearing officers are appropriately informed.

ROBERT F. KENNEDY,
Attorney General.

APPENDIX D

Form No. G-27
(Rev. 4-2-56)

DEPARTMENT OF JUSTICE WASHINGTON, D.C.

NOTICE OF HEARING

Seattle
(City)

Washington
(State)

November 21, 1963
(Date)

TO: KENNETH GERALD STOREY, JR.
(Name of Registrant)

4410 South 176th
(Street Address)

Seattle 98188
(City)

Washington
(State)

You are hereby notified that before the undersigned
Hearing Officer at

1018
(Room)

Northern Life Tower
(Building)

3rd Ave. & University St.
(Street Address)

Seattle
(City)

Washington
(State)

, at 4:00 P.M.
(Hour)

o'clock on December 4, 1963, a hearing, at which you are
(Month) (Day)

requested to be present, will be held by the Department of
Justice to consider your claim to exemption from training
and service under the Universal Military Training and Serv-
ice Act by reason of your alleged conscientious objection to
participation in war in any form. Only your conscientious-
objector claim will be considered by the Department of
Justice.

JOHN D. McLAUCHLAN
*Special Hearing Officer for
the Department of Justice*

ADDENDUM NO. I TO INSTRUCTIONS TO SPECIAL HEARING OFFICERS FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

NOTICE OF HEARING AND INSTRUCTIONS TO REGISTRANTS WHOSE CLAIMS FOR EXEMPTION AS CONSCIENTIOUS OBJECTORS HAVE BEEN APPEALED

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious-objector claim only. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System .

2. The hearing will be conducted by the undersigned, a Special Hearing Officer for the Department of Justice, appointed by the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious-objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in

support of his conscientious-objector claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths. Such statements or documents will be considered for whatever bearing they may have upon the registrant's conscientious-objector claim. They will not be considered in connection with any other claim whatsoever.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. If the registrant wishes to deny, explain, or otherwise comment upon any information contained in the resume, he should do so in a written statement to the Hearing Officer. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Technical rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any arguments concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

JOHN D. McLAUCHLAN
*Special Hearing Officer for
the Department of Justice*

APPENDIX E

INSTRUCTIONS TO SPECIAL HEARING OFFICERS FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

MEMO NO. 41 (Revised)

April 2, 1956

PART 100—AUTHORITY AND RESPONSIBILITY

Sec. 100.1 Section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, requires the Department of Justice to make inquiry, hold a hearing with respect to the character and good faith of the conscientious-objector claim of any Selective Service registrant whose classification by his local board is appealed, and to make a recommendation to the appropriate Selective Service Appeal Board.

Sec. 100.2 The required hearing shall be conducted by a Special Hearing Officer for the Department of Justice, appointed by the Attorney General for such purpose. The Hearing Officer shall render a report of such hearing to the Department of Justice which shall consider such report in making its recommendation to the appropriate Appeal Board.

* * * *

Sec. 100.4 The appropriate United States Attorney shall arrange for the required investigation and shall transmit to the Hearing Officer the Selective Service Cover Sheet, the investigative report for use in conducting the hearing, and two copies of a resume of such report.

PART 101—HANDLING DOCUMENTS

• • • •

Sec. 101.2 The Federal Bureau of Investigation reports which are made in these cases are confidential and are for the Hearing Officer's information and assistance in arriving at a conclusion regarding the character and good faith of the registrant's alleged conscientious objection. The Federal Bureau of Investigation report is not a part of the Selective Service System file of the registrant, and he should not be allowed to see it under any circumstances.

Sec. 101.3 Although the registrant is not allowed access to the Federal Bureau of Investigation reports a fair resume of the information contained therein shall be furnished the registrant. The resume will be forwarded to the Hearing Officer in duplicate by the United States Attorney with the file in the case. The Hearing Officer shall attach a copy of the resume to the Notice of Hearing which he sends the registrant. The second copy is for the use of the Hearing Officer and should be returned to the Department with his report of hearing.

PART 102—PREPARATION FOR HEARING

• • • •

Sec. 102.2 If the Hearing Officer deems it advisable, he may request the United States Attorney to arrange for such further investigation of matters pertinent to any case as appears necessary to a complete hearing on the claim, or he may confer personally with the local office of the Federal Bureau of Investigation concerning the case.

PART 103—NOTICE AND INSTRUCTIONS TO REGISTRANTS

Sec. 103.1 The Hearing Officer shall notify the registrant concerned of the time and place of the hearing at least ten days prior to the date set for the hearing. The Notice of Hearing must be accompanied by a copy of Instructions to Registrants, and one copy of the Resume of the Inquiry received from the United States Attorney. The Notice of Hearing and the Instructions to Registrants should be signed by the Hearing Officer. Notice of Hearing forms and Instructions to Registrants will be furnished the Hearing Officer by the Conscientious Objector Section, Department of Justice, Washington 25, D. C.

* * * *

PART 104—CONDUCT OF THE HEARING

Sec. 104.1 The hearing contemplated under the Act is to be in the nature of an administrative proceeding and shall be informal, non-technical, and flexible. Care shall be exercised to avoid any resemblance to a judicial proceeding or a prosecutive action, and in no sense shall the registrant be deemed to be on trial. The ordinary rules of evidence shall not apply. The Hearing Officer is not authorized to subpoena witnesses or to administer oaths, and consequently the testimony of voluntary witnesses will not be sworn. The hearing shall be conducted in an orderly, dignified, and expeditious manner. Conduct of the hearing shall at all times be under the direction and control of the Hearing Officer, and the

Hearing Officer is to be the sole judge in the matter of choice of method to effectuate the desired results.

Sec. 104.2 The scope of the hearing shall be restricted to consideration of the merits of the conscientious-objector claim only, and it shall be the function of the Hearing Officer to secure the facts upon which to base his findings and his recommendation to the Department of Justice.

Sec. 104.3 The Hearing Officer shall allow the informal presentation of the testimony of the registrant and his witnesses. All relevant testimony shall be received. The Hearing Officer shall be the sole judge of the relevancy of the testimony.

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Sec. 104.5 The Hearing Officer shall permit the registrant to have one attorney or other personal adviser, who may sit with the registrant during the hearing. Neither the registrant's adviser nor any other person shall be permitted to object to any question or make any argument concerning any phase of the proceeding.

Sec. 104.6 Within the discretion of the Hearing Officer, the registrant's witnesses may remain in the hearing room, or they may be excluded and called one at a time. One personal adviser, however, may remain with the registrant in the hearing room during the entire proceeding.

• • • •

PART 105—REQUIREMENTS AND OBJECTIVES OF THE HEARING

Sec. 105.1 The basic objective of the hearing in all conscientious-objector cases is to ascertain the character and good faith of the objections of persons who claim exemption as conscientious objectors. It is necessary, therefore, to determine the sincerity of the registrant in making the conscientious-objector claim, and to examine the nature or character of the claim in light of the requirements of the Act.

Sec. 105.2 The exemption provided for conscientious objectors, in section 6(j) of the Act, does not have its basis in a constitutional guarantee but is a special benefit granted by the Congress. It is a well-known rule of statutory construction that grants by the legislature which confer special benefits or exemptions in derogation of common and equal rights are to be construed strictly against the grantee. Thus, this section which grants exemption to a particular class from the general burdens of the State is subject to strict and literal construction.

Sec. 105.3 The Supreme Court of the United States has held in a number of cases that determinations made by discretionary administrative bodies are final, although they may be erroneous, if they are not arbitrary or capricious, or unless there is no basis in fact for the determination. Probably for this reason the courts have never indicated the standard of proof applicable to hearings in conscientious-objector cases.

* * * *

Sec. 105.5 The Act provides exemption for persons who are, by reason of religious training and belief, conscien-

tiously opposed to participation in war in any form. The term "religious training and belief" is defined in the Act as the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. The Act specifically excepts from its definition of religious training and belief essentially political, sociological, or philosophical views or a merely personal moral code. It is incumbent upon the registrant, therefore, to show that his objections stem from his religious training and belief as defined in the Act.

• • • •

Sec. 105.8 A person who is exempt from combatant training and service will, if inducted, be assigned to noncombatant training and service as defined by the President in Executive Order No. 10028 of January 13, 1949, as follows:

The term 'noncombatant service' shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons.

Section. 105.9 Under the Act and the Selective Service Regulations, a person who is exempt from both combatant and noncombatant training and service shall, in lieu of in-

duction, be ordered by his local board to perform for a period of 24 months civilian work contributing to the maintenance of the national health, safety, or interest.

PART 106—THE REPORT AND RECOMMENDATION

Section. 106.1 Based upon the conclusions reached as a result of the hearing, the Hearing Officer may make one of three possible recommendations to the Department of Justice. These are as follows:

- (1) "The Hearing Officer recommends that the appeal of the registrant, based upon grounds of conscientious objection, be not sustained." This recommendation shall be made when the registrant claims exemption from combatant training and service only or from both combatant and noncombatant training and service and any one of the following conclusions is reached:
 - (a) The registrant is not opposed to participation in war in any form.
 - (b) The registrant's conscientious objections are not based on religious training and belief.
 - (c) The registrant's claim is not made in good faith.
- (2) "The Hearing Officer recommends that the appeal of the registrant, based upon grounds of conscientious objection, be sustained." This recommendation shall be made when the registrant claims exemption from combatant training and service only

or from both combatant and noncombatant training and service and all of the following conclusions are reached:

- (a) The registrant is opposed to participation in war in any form.
- (b) The registrant's conscientious objections are based upon his religious training and belief.
- (c) The registrant is sincere and his claim is made in good faith.

(3) "The Hearing Officer recommends that the registrant be exempt from combatant training and service only and if inducted into the armed forces he be assigned to noncombatant training and service as defined by the President." This recommendation shall be made when the registrant claims exemption from both combatant and noncombatant training and service and the following conclusions are reached:

- (a) The registrant is conscientiously opposed to combatant training and service.
- (b) The registrant's conscientious objections are based upon his religious training and belief.
- (c) The registrant is not conscientiously opposed to noncombatant training and service.

• • • •

PART 107—REVIEW BY THE DEPARTMENT OF JUSTICE

Sec. 107.1 When the registrant's file and the report of the Hearing Officer are received by the Department of Justice, they are inspected to assure that the Department has jurisdiction in the case, and that the registrant has been afforded all his rights under the Act and the Regulations promulgated thereunder. If the case is in proper order, the Department proceeds to review the case and make its recommendation to the appropriate appeal board as required by the Act. In some instances, it may be necessary to return the registrant's file to the Selective Service System for further action, and in exceptional circumstances it may be found advisable to return a file to the Hearing Officer for additional information or a more complete report.

PART 111—SUBPOENA

Sec. 111.1 In cases arising under section 12, Universal Military Training and Service Act, courts generally deny motions to subpoena Hearing Officers.

Sec. 111.2 The Hearing Officer occupies a quasi-judicial position, and the mental process by which he arrives at a conclusion or recommendation is not a proper subject of inquiry by the court.

Sec. 111.3 The Hearing Officer may not testify as to the content of the Federal Bureau of Investigation report. He should notify the United States Attorney immediately, should a subpoena relating to any conscientious-objector case be served upon him.

PART 112—STENOGRAPHIC ASSISTANCE

Sec. 112.1 Should the Hearing Officer require stenographic assistance in preparing his reports, he should request it of the United States Attorney, giving him an estimate of the requirements.

Sec. 112.2 Since the testimony in conscientious-objector cases is not legalistic, and usually is not lengthy or involved, most Hearing Officers are able to prepare their reports from personal notes taken at the hearing. In unusual cases the Hearing Officer may wish to have a transcript of the hearing. Request for reportorial service should also be made to the United States Attorney as indicated above.

• • • •

PART 114—OFFICE SPACE

Sec. 114.1 Suitable space for holding hearings is usually available in Federal Buildings. The United States Attorney will assist the Hearing Officer in arranging for a mutually agreeable location.

Sec. 114.2 If the Hearing Officer finds it more convenient to hold hearings in his office, he may do so with the approval of the United States Attorney, provided that no expense accrues to the Government for use of space in such office.

Attorney General

APPENDIX F

The formidable doctrinal requirements of appellant's Church adhered by him are: keeping the weekly Saturday Sabbath from Friday sundown to Saturday sundown by not working, and spending the time in Bible study; by likewise refraining from everyday activity on seven other annual Holy days; by refraining from eating any products made with leaven for a period of seven specific days out of the year; by refraining from all food and water for a full twenty-four hours at least once a year, by donating ten percent of his gross income to the Church and setting aside a second ten percent of his gross income for expenses to attend the annual Holy days; by not eating pork products or other foods the Bible condemns as unclean; by attending the Church's public speaking club one night a week and Bible study another night; by donating work to the publication of the Church newspaper; by not smoking and by refusing to take defense related employment. (Ex. 132; Govt's. Ex. 2; T. 36)

APPENDIX G

The numerous and varied religious grounds upon which appellant predicated his objections to noncombatant service are, in summary form:

That he was now a servant of God, could not serve both God and man and therefore could not become a slave to man (I Cor. 7:23). That by going into the military he would be a slave to man, this would be sin, and would subject him to eternal damnation. That if he

helped anyone who did not follow God's Word, he would be partaking of their evil deeds (II John 10-11) and God commanded him not to be partaker of another man's sins (I Tim. 5:22). That we are to love our neighbors and even our enemies (Matt. 5:43). That the military stands forever opposite to God's Word. That it is better to be defrauded than to fight back (I Cor. 6:1-7). That vengeance is God's and not his. That a Christian is to turn the other cheek. (Ex. 59)

That Jesus said His servants would not fight in this world (John 18:36). That a Christian is forbidden to become a party of the world or to engage in its conflicts or its goals (James 4:4; I John 2:15). That Christ taught We should not fight or resist evil, not take vengeance upon others ourselves, but that we should render good for evil. (Ex. 133-134)

That he did not believe in a malicious force but only a restraining force such as holding someone so that they could not afflict wounds or injury to someone else. (Ex. 132)

That he could not in any manner, directly or indirectly, take human life and that bearing arms and coming under the military authority would be contrary to fundamental doctrine of his belief. (Ex. 145-146)

APPENDIX H

In *U.S. v. Minker*, 350 U.S. 189 an immigration officer attempted to compel the attendance of a citizen into the immigration officer's private chambers by a nonjudicial subpoena. On page 191 the Court stated:

“The object in summoning Minker was to interrogate him in the immigration officer’s private chambers to try to elicit information ‘relating to the possible institution of proceedings seeking the revocation of ° ° ° (Minker’s) naturalization. ° ° °’ Information so obtained might be used under some circumstances in court to take away Minker’s American citizenship or convict him of perjury or some other crime. Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. Yet power of the Attorney General and immigration officers to compel persons, including suspects, to appear and subject themselves to questioning by law enforcement officers in their private chambers is precisely what the Department of Justice claims here.”

No. 20932

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COURT OF APPEALS
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KENNETH G. STOREY, JR.
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

FILED

SEP - 2 1966

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION¹

Appellant was charged in the following one count Indictment with refusing to be inducted into the Armed Forces of the United States on or about June 9, 1964 (R1):

“The Grand Jury Charges:

-
1. In this brief, (R) will refer to the number of the records herein given by the Clerk of the Court for the Western District of Washington. (TR) will refer to the Court Reporter's transcript of proceedings. (EX) will refer to exhibits.

COUNT I

That on or about June 9, 1964, at Seattle, Washington, within the Northern Division of the Western District of Washington, KENNETH G. STOREY, JR., did knowingly, wilfully and unlawfully fail, neglect, and refuse to perform a duty required of him by the Universal Military Training and Service Act, and the rules, regulations, and directions made pursuant thereto, in that, having been duly and regularly ordered by a local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

All in violation of Title 50 U.S.C., App., Section 462, and 32 C.F.R. 1632.14."

Appellant entered a plea of "not guilty" on August 2, 1965, (TR 5), waived trial by jury (TR 5 and R2) and was tried by the Court on December 6, 1965 (TR). The case was continued until January 21, 1966, and appellant's Motion for Judgment of Acquittal was denied on that date (TR pp 4-6). Appellant was found guilty by the Court on January 21, 1966, (TR 6) and sentenced on February 25, 1966, to the custody of the Attorney General for a period of four years (R7). A timely notice of appeal was filed on March 2, 1966 (R8).

Jurisdiction of the District Court was based on Title 18, U.S.C. Section 3231. This Court has jurisdiction of the appeal under Title 28, U.S.C., Section 1291.

COUNTERSTATEMENT OF THE CASE

The testimony taken at the trial and the exhibits admitted into evidence established that the appellant was ordered by Local Board No. 6, Selective Service, Seattle, Washington, on May 25, 1964, to report for induction into the Armed Forces of the United States on June 9, 1964, at Seattle, Washington (EX 51). Appellant reported to the Induction Station in Seattle on June 9, 1964, but refused to be inducted into the Armed Forces (EX 11-16). At that time he signed a witnessed statement as follows:

"I refuse to be inducted into the Armed Forces of the United States."

/s/ Kenneth G. Storey, Jr.
June 9, 1964" (EX 15)

The following summary of events leading up to appellant's refusal to be inducted is presented in chronological order for the Court's convenience:

February 4, 1958: The appellant, hereinafter referred to as "registrant," registered with Local Board No. 6 of the Selective Service System in Seattle, Washington. No claim for conscientious objector classification was made.

October 29, 1960: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was employed by the Boeing Airplane Company in a capacity involving the drawing of ground support equipment for minuteman missiles (EX 169).

November 11, 1960: Registrant was married (EX 167).

April 6, 1961: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was still employed by the Boeing Company

and that his duties included working on launch facilities equipment for minuteman missiles (EX 167).

November 3, 1961: Registrant advised Local Board No. 6 on a Current Information Questionnaire that his duties at Boeing Company involved designing and drawing missile test equipment (EX 165).

November 21, 1961: Registrant was ordered to report for an Armed Forces Physical Examination on December 8, 1961 (EX 163).

January 25, 1962: Registrant was advised that he had been found fully acceptable for induction into the Armed Forces (EX 159).

October 5, 1962: Registrant was divorced from his wife (EX 157).

March 1, 1963: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was still employed by the Boeing Company, working on support equipment for minuteman missiles (EX 157).

March 25, 1963: Local Board No. 6 received a letter from registrant in which he stated that he had become a conscientious objector, and requested that his classification be changed to 1-O, and that the special forms for conscientious objectors be sent to him (EX 155).

April 3, 1963: Registrant asked Local Board No. 6 if his current Boeing position on the minute-man missile program was classified as "defense work" (EX 153). (Please note that registrant did not resign from his Boeing employment until approximately one year later—March 31, 1964) (EX 55).

April 4, 1963: Registrant submitted complete conscientious objector forms to Local Board No. 6 (EX 131-139).

April 15, 1963: Registrant classified 1-A by Local Board No. 6 (EX 119).

May 20, 1963: Registrant appeared personally for a hearing before Local Board No. 6 and requested that his classification be changed to 1-O. The Board determined that Registrant should be retained in 1-A classification (EX 129 and 76).

May 26, 1963: Registrant was baptized into the Radio Church of God (EX 121).

July 23, 1963: United States Attorney was advised that the Appeal Board for the Western Federal Judicial District of the State of Washington had determined that the registrant should not be classified in Class 1-O or in a lower class (EX 112).

December 4, 1963: Registrant appeared before a Special Hearing Officer of the Department of Justice who found that registrant was sincere in his opposition to combatant military training and service, but that he was not sincere in his claimed opposition to all other forms of non-combatant service (EX 78).

February 27, 1964: T. Oscar Smith, Chief, Conscientious Section, Department of Justice, suggested to the Appeal Board that a sufficient basis in fact exists to deny registrant's claim to exemption from noncombatant service (EX 82).

March 4, 1964: Registrant was furnished with a copy of Mr. Smith's recommendation (EX 73).

March 31, 1964: Registrant quit his job at the Boeing Company (EX 55).

April 20, 1964: Appeal Board classified registrant 1-A-O by unanimous vote (EX 10).

May 25, 1964: Registrant was ordered to report for induction into the Armed Forces on June 9, 1964 (EX 51).

June 9, 1964: Registrant refused induction and signed a statement as follows: "I refuse to be inducted into the Armed Forces of the United States. /s/ Kenneth G. Storey, Jr. June 9, 1964" (EX 15).

QUESTIONS PRESENTED

1. Was the appellant induced into a prejudicial position when the local board failed to respond to a letter of inquiry?

2. Was the appellant denied due process when not informed of ostensibly derogatory information placed before the Appeal Board by his minister when appellant did in fact rebut said information?

3. & 4. Did the Local Board act arbitrarily in refusing to reopen appellant's file on the basis of new information received when no timely request to reopen was made by appellant and when the new information was nevertheless considered by the Appeal Board?

5. Was the Hearing Officer's report ambiguous, and if so, did the Department of Justice's recommendation to the Appeal Board deny appellant due process?

6. Was there a basis in fact for appellant's 1-A-O classification?

7. Did the Department of Justice predicate its recommendation on an illegal basis?

8. Was the appellant denied due process by the Hearing Officer's failure to advise him of a right to counsel and to remain silent?

9. Did the Court properly deny the introduction of certain witness' testimony?

SUMMARY OF ARGUMENT

1. The Local Board's failure to respond to appellant's letter of inquiry did not induce him into a prejudicial position because Local Boards have no duty to render advice in complex legal matters and because registrant already knew that his defense employment was "wrong."

2. Appellant was not denied due process when ostensibly derogatory information was sent to the Appeal Board by his minister because appellant did in fact rebut said information.

3. & 4. The Local Board did not act arbitrarily in refusing to reopen appellant's file on the basis of new information received because no timely request to reopen was made by appellant and because the new information was nevertheless considered by the Appeal Board.

5. The Department of Justice's recommendation to the Appeal Board was fair and the Hearing Officer's Report was not ambiguous or unfair.

6. There was a legally sufficient and ample basis in fact to support the 1-A-O classification given appellant.

7. The Department of Justice did not base its recommendation to the Appeal Board on an illegal basis.

8. The Department of Justice hearing officer did not deprive appellant of any constitutional rights to which he was entitled.

9. The Court properly denied the introduction of certain witness' testimony because a Court's review of a registrant's classification is limited to the evidence which was before the Selective Service Boards and on which said board acted.

ARGUMENT

I

THE LOCAL BOARD'S FAILURE TO RESPOND TO APPELLANT'S LETTER OF INQUIRY DID NOT DEPRIVE HIM OF CRUCIAL COUNSEL NOR INDUCE HIM INTO A PREJUDICIAL POSITION

Registrant contends that the Local Board's failure to respond to a letter of inquiry written on March 25, 1963, and pertaining to the propriety of his employment in the minuteman section of the Boeing Company deprived him of essential counsel and entrapped him into prejudicial position. This argument is without merit because (1) the Court of Appeals for the Ninth Circuit has held that a Local Board has no duty to provide advisors for registrants, and (2) the registrant was well aware that his minuteman position was connected with warfare and that he was contributing directly to a war effort.

Selective Service Regulation 1604.14 provides:

Advisors to registrants *may* be appointed by the Director of Selective Service . . . to advise registrants. . . . The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office. [emphasis added]

The Ninth Circuit Court interpreted this regulation in *Uffelman v. United States*, 230 F.2d 297 (9th Cir.

1956) by holding that the lack of a formally designated "advisor to registrants" did not amount to a denial of procedural due process, reasoning that the mandatory word "shall" was omitted from the above-cited regulation in a 1955 amendment and replaced with the permissive word "may." And in *Yaich v. United States*, 283 F.2d 613 (9th Cir. 1960), the Circuit Court again held that the appointment of advisors by the local draft boards has been discretionary and not mandatory since 1955. In view of the fact that local boards have no duty to provide advisors, it seems clear that such boards are under no duty to provide advice in matters involving complex legal questions; this is an area for private counsel.

However, Mrs. Dorothy Conner of the local draft board testified at the trial of the instant case that the names and addresses of three local private advisors *are* posted conspicuously in the local board office, even though not required by Court interpretation of the regulation (TR 28 and 29). If the registrant were genuinely concerned about the legal propriety of his employment at the Boeing Company and its effect upon his claim for a conscientious objector status, it would have been reasonable for him to personally visit the local board office and obtain the name of a private advisor from the bulletin board, or to have consulted his private attorney.

The registrant was well aware of the fact that his Boeing position was directly connected with warfare. In a letter written to the Local Board by the registrant and received by said Board on March 25, 1963, (EX 156) the registrant states:

" . . . I am currently working at Boeing's as a draftsman in the minuteman section. As soon

as I find another job, *that is not connected with warfare*, I will quit Boeing's. . . . (emphasis ours).

When asked at trial to explain how he arrived at the conclusion that his minuteman position was connected with warfare, Mr. Storey stated (TR p. 30): "I looked at the circumstances around me at the Boeing Company and I felt it was wrong." (Please note, however, that the registrant did not resign from his Boeing employment until approximately one year later—March 31, 1964 [EX 61].

If he were indeed conscientiously opposed by reason of religious training or belief to participation in war or in any endeavor connected with military preparation, as alleged, it is reasonable to assume that he would have terminated his minuteman employment *at that time* since he admittedly *knew* at that time the nature of his work. Why did he continue said employment? The only possible explanation is that the registrant was not conscientiously opposed by reason of religious or personal training and belief to participating in the minuteman program with its military role.

Registrant places great emphasis on the allegation that he was misadvised by his church and that his church sanctioned his Boeing employment. However, the minister who allegedly sanctioned Mr. Storey's minuteman employment wrote the following letter to Mr. Storey's Appeal Board:

"The Resume of the Inquiry of Mr. Kenneth Gerald Storey, Jr. . . . eludes to the assumption that I sanctioned Mr. Storey working on missiles either directly or indirectly. Neither the Radio Church of God nor I teach that anyone should work on anything even remotely connected to the military. . . ." (EX 58).

Why then did this registrant request the Local Board's advice in the controversial letter of April 3, 1963, as to whether or not his employment at Boeing was defense work when, as we have seen above, he already *knew* it was ". . . connected with warfare. . . ." (EX 156) and he ". . . felt it was wrong . . ." (TR 30) The Local Board certainly could not look inside Mr. Storey's mind and inform him as to his subjective religious beliefs. The Government submits that the reason for writing the letter of April 3, 1963, was that Mr. Storey was more concerned with his draft status than with his conscience. He wanted to find out if he could have his cake and eat it too—if he could continue in a lucrative defense job and still obtain an exemption from military service.

The fact that the registrant was more concerned with his draft status than with his religious beliefs, if any, are further evidenced by his testimony at the trial of this case. After stating from the witness stand that he transferred from the minuteman program to the Transport Division of the Boeing Company in November, 1963, Mr. Storey further stated the reason for the transfer:

"I chose the job in Renton (Transport Division), because I felt that it would be a better job in the eyes of my draft board." (TR 42)

The Assistant United States Attorney then inquired:

"Was that the only reason you wanted that (the transfer) because it would make you look better in the eyes of your draft board," (TR 43) to which question Mr. Storey replied: "Yes" (TR 43).

Hence, the government concludes that under the circumstances of this case the Local Board's failure

to respond to Mr. Storey's letter of April 3, 1963, did not deprive him of crucial counsel and did not induce him into the very circumstances upon which the Selective Service System denied him a 1-O classification. Assuming the Board had responded and told Mr. Storey that his minuteman job would disqualify him from a 1-O classification, he testified that "I would go ahead and terminate my job." (TR 31) Such termination then would have resulted from the fact that the minuteman employment jeopardized Storey's chances of obtaining a 1-O classification, *not* because his religious training and beliefs prevented him from making machines of war.

II

APPELLANT WAS NOT DENIED DUE PROCESS WHEN OSTENSIBLY DEROGATORY INFORMATION WAS PLACED BEFORE THE APPEAL BOARD BECAUSE APPELLANT DID IN FACT SUBMIT REBUTTAL EVIDENCE

The registrant contends that he was denied due process because he was not informed of nor afforded the opportunity to rebut information contained in a letter dated April 2, 1964 (EX 58) and sent to the Appeal Board by a minister of registrant's church.

Notwithstanding registrant's assertion, registrant's Selective Service file shows that rebuttal evidence was in fact presented to the Appeal Board and was in fact available for consideration at the April 20, 1964, meeting of the Appeal Board at which meeting registrant was classified 1-A-O. The rebuttal evidence was as follows:

1. (EX 55) A letter written by the registrant on March 31, 1964, and received by the Board on April 2, 1964. The registrant stated in said let-

ter that he had terminated his Boeing employment.

2. (EX 59-61) A letter written by the registrant on March 31, 1964, and received by the Local Board on April 2, 1964. The registrant reviews his entire religious history in said letter and specifically rebuts the letter sent by his minister.
3. (EX 63-66) A letter written by Mr. Gerald A. Lindberg on March 31, 1964, and received by the Board on April 2, 1964. This letter reviews registrant's religious history and attests to the registrant's sincerity.
4. (EX 67-69) A letter written by registrant's attorney, Mr. Ralph K. Helge on March 30, 1964, and received by the Board on April 1, 1964. Mr. Helge elaborated upon and explained the misunderstanding between the registrant and his minister concerning his minuteman employment, the topic of the controversy.

All of the above-stated evidence was received by the Board during the first few days of April, 1964, and was certainly available to the Board at their April 20, 1964 meeting. It appears to Government counsel that the letters from the registrant himself, from a close friend and from his attorney are ample to rebut one possibly derogatory letter from his minister.

Furthermore, the cases cited in Registrant's brief are not in point. In *Gonzales v. United States*, 348 U.S. 407 (1955) the registrant was not furnished a copy of the Department of Justice's recommendation to the Appeal Board. In the instant case, Mr. Storey was sent a copy of the recommendation on March 4, 1964, and was specifically advised of his right to file a reply with the Appeal Board (EX 73).

In *Chernekov v. United States*, 219 F.2d 721 (1955) the appellants were not furnished a copy of

the Resume of the Inquiry prior to his hearing before the Department of Justice Hearing Officer. Nothing is said in *Chernekov* about derogatory information received *after* the registrant has appeared before the Hearing Officer.

In summary, the registrant was not denied due process because he did in fact present rebuttal evidence to the Appeal Board which evidence was before the Board for consideration at the same time the ostensibly derogatory letter was before the Board.

III & IV

THE LOCAL BOARD DID NOT ACT ARBITRARILY IN REFUSING TO REOPEN APPELLANT'S FILE BECAUSE NO TIMELY REQUEST TO REOPEN WAS MADE AND THE NEW INFORMATION WAS CONSIDERED ANYWAY

Registrant contends in his brief that the Local Board refused for the wrong reasons to reopen his file when it received new information concerning his employment at Boeing and his baptism into the Radio Church of God. It is the Government's position that the reason for refusal is immaterial, because the reason itself was not prejudicial to the registrant. However, the registrant goes further by contending that the refusal was arbitrary, and cites *Stain v. United States*, 235 F.2d 339 (9th Cir. 1959) as authority. *Stain*, supra, is easily distinguishable because the Local Board had completely refused to consider the defendant's Special Form for Conscientious Objectors submitted after he had been classified 1-A, whereas, in the instant case, the Board did afford Mr. Storey all of the special procedures designed for conscientious objectors after he first re-

quested such status on March 25, 1963, including a personal appearance before the Local Board on May 20, 1963, a review by the Appeal Board on July 18, 1963, and an appearance before a Department of Justice Hearing Officer.

The registrant also cites *Brown v. United States*, 216 F.2d 258 (9th Cir. 1954) as authority for the contention that a local draft board has a *duty* to reconsider a classification whenever *any* new information regarding a change of status is declared. However, the Selective Service Regulation 1625.2 states that the local board *may* reopen and consider anew the classification of a registrant, a discretionary duty. The only *mandatory* duty placed on a local board is to reopen and reconsider a classification only when the State Director of Selective Service so requests (Selective Service Regulation 1625.3). And the Court of Appeals for the Ninth Circuit stated in *Badger v. United States*, 322 F.2d 902 (9th Cir. 1963) at p. 908:

Furthermore . . . the local board was under no duty to reopen and consider anew the classification of appellant since . . . reopening does not follow automatically from such a request when made.

Selective Service Regulation 1625.4 provides:

When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that such request fails to present any facts in addition to those considered when the registrant was classified, *or even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification* . . . [emphasis added]

Now that the law has been set forth, let us consider the facts of the instant case. Appellant's chief concern appears to be that new evidence which would allegedly qualify him for a conscientious objector classification was never considered by the Board, specifically the letter written by the registrant on May 28, 1963, in which he stated he had been recently baptized into the Radio Church of God (EX 121), and the registrant's letter of March 31, 1964, in which he advised the Board he had terminated his Boeing employment. The fact is that both of these letters were before the Appeal Board at their April 20, 1964, meeting at which time the Board reviewed the registrant's file and determined to classify him 1-A-O. Hence, this new information *was* considered.

Furthermore, Mr. Storey did not request that his classification be reopened in either the letter concerning his baptism (EX 121) or the letter concerning his termination of employment at Boeing (EX 55). The Court of Appeals for the Ninth Circuit held in *Shaw v. United States*, 264 F.2d 118 (9th Cir. 1959) that a registrant whose written communication to his local draft board did not request a reopening of his classification is not entitled to have his classification reopened. A mere notice of a change in a status cannot be viewed as a request to reopen. *Taylor v. United States*, 285 F.2d 703 (9th Cir. 1960). Therefore, not having requested the Local Board to reopen his file, Mr. Storey cannot complain now, especially in view of the fact that the new information was before the Appeal Board during its April 20, 1964, meeting.

The file further reveals that on May 25, 1964, Local Board No. 6 ordered Mr. Storey to report for

induction. Eleven days later, on June 5, 1964, Mr. Helge, Storey's attorney, then wrote the local board requesting that the Order for Induction be cancelled and Storey's classification be reopened (EX 46). The June 5 request to reopen is the only request to reopen contained in the file, and as such was submitted too late. 32 C.F.R. Section 1625.2 (Rev. 1951) provides in part:

" . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status over which the registrant had no control."

Accord: *Boyd v. United States*, 269 F.2d 607 (9th Cir. 1959); *Feuer v. United States*, 208 F.2d 719 (9th Cir. 1953).

Hence, the Government concludes (1) the new information was in fact considered by the Appeal Board at its April 20, 1964, meeting; (2) the Local Board did not deny registrant due process by failing to reopen his classification because he failed to request such action; and (3) the request to reopen from registrant's attorney was submitted too late.

V

DEPARTMENT OF JUSTICE'S RECOMMENDATION TO THE APPEAL BOARD WAS FAIR AND HEARING OFFICER'S REPORT WAS NOT AMBIGUOUS OR UNFAIR

The Hearing Officer's report to the Department of Justice certainly appears to Government counsel to be unambiguous, and the Department's rec-

ommendation to the Appeal Board appears to be a fair resumé of the Hearing Officer's report. Looking at the report as a whole, the Hearing Officer is simply saying that the registrant is sincere in his objection to combatant duty and to hospital or Saturday work, but is not sincere in his objection to all other non-combatant military duty. The Department of Justice then passes this information on to the Appeal Board. To read any other meaning into the reports requires an abundance of imaginative conjecture.

VI

THE 1-A-O CLASSIFICATION GIVEN APPELLANT HAD A BASIS IN FACT WHICH WAS LEGALLY SUFFICIENT

It should be noted that the Selective Service Act makes no provision for judicial review of the actions of local boards or the appeal agencies. Section 10(a)(2) of the Act provides "decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

However, the Courts have interpreted Congressional silence on this matter to mean that a very limited degree of judicial review is permissible. Thus, the applicable standard of judicial review in conscientious objector matters was well stated in *Estep v. United States*, 327 U.S. 114, 122-123 (1946):

"... courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the

local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Even if a Court or jury would reach a different decision and, for that matter, even if the Board is erroneous, this is no defense as long as there is a basis in fact for the decision. *Cox v. United States*, 332 U.S. 442, 453 (U.S.S.C. 1947); *Dickinson v. United States*, 346 U.S. 389, 393 (U.S.S.C. 1953).

The general rule, as announced by the Ninth Circuit in *White v. United States*, 215 F.2d 782 (9th Cir. 1954), *cert. den.* 348 U.S. 970, is that a registrant's willingness to engage in the production of defense materials constitutes a basis in fact for denial of his conscientious objector claim for exemption from non-combatant military service. The same rule has been adhered to in numerous other circuits. See *Blalock v. United States*, 247 F.2d 615 (4th Cir. 1957); *Meredith v. United States*, 247 F.2d 622 (4th Cir. 1957); *Robertson v. United States*, 208 F. 2d 166 (10th Cir. 1953); *United States v. Neverline*, 266 F.2d 180 (3rd Cir. 1959). It should be noted that the registrant in *White*, *supra*, did not even work directly for Douglas Aircraft Company, which had a war contract, but for a firm which supplied parts to Douglas. Nevertheless, White's employment was held to be a sufficient "basis in fact" to sustain the denial of his 1-A-O classification.

Now, let us examine the following objective facts which were available to the Appeal Board when it finally classified Mr. Storey 1-A-O on April 20, 1964. The Government contends that said facts are ample in accordance with the "basis in fact" criteria to sustain the Board's classification:

1. A Current Information Questionnaire received

from Storey on October 29, 1960, stating that he was employed at Boeing in a capacity involving the drawing of ground support equipment for minute-man missiles (EX 169).

2. Current Information Questionnaire received from Storey on April 6, 1961, stating he was still employed at Boeing and worked on launch facility equipment for minuteman missiles (EX 167).

3. Current Information Questionnaire received from Storey on November 3, 1961, stating that his Boeing duties involved designing and drawing missile test equipment (EX 165).

4. Current Information Questionnaire received from Storey on March 1, 1963, stating that his Boeing Employment still involved work on support equipment for the minuteman missile (EX 157).

5. A letter from Mr. Storey written on March 25, 1963, in which he acknowledged that his Boeing position was connected with warfare (EX 156) coupled with the fact that in spite of such knowledge he continued his Boeing employment for another year—until March 31, 1964 (EX 61).

6. Storey's resignation from Boeing on March 31, 1961, closely followed his receipt on March 4, 1964, of a copy of the Department of Justice's recommendation to the Appeal Board that a sufficient basis in fact exists to deny his claim to exemption from non-combatant service.

7. Statements from fellow Boeing employees that Storey must have realized his work was involved with the launching of nuclear missiles, but that he never objected to this type of work nor did he ever express opinions concerning war or religion (EX 86 & 90).

8. A recommendation from the Department of Justice based on the report of a hearing officer who had an opportunity to personally observe Storey's demeanor, that Storey appeared to be embarrassed and uncertain in his attempted justification of his employment involving minuteman missiles.

9. The Local Board's denial of Storey's conscientious objector claim based in part on the Local Board's personal observation of Storey's demeanor and creditability during his personal appearance before the Local Board on May 20, 1963.

The Government contends that the above-mentioned facts are ample to support the Appeal Board's decision that the registrant should be classified 1-A-O. This is not a situation where a decision was based on one isolated fact by one agency; rather it is a situation where the registrant was given every available opportunity to prove his claim for exemption from non-combatant service, but failed to convince anyone. It is a situation where the Local Board, Hearing Officer, Department of Justice and the Appeal Board have taken into consideration evidence of events concerning the registrant over a period of several years and then the Appeal Board made its final classification decision on the basis of these facts.

Additional information supporting the Appeal Board's classification was available to the trial court, in that Mr. Storey testified the reason for his transfer from the minuteman program to the Transport Division at Boeing in November, 1963 was: "because I felt that it would be a better job in the eyes of my draft board." (TR 43). If Storey were indeed sincere in his opposition to working on

military equipment and to non-combatant military duty, it is reasonable to assume that he would have transferred from the minuteman to Transport on the basis of his religious or personal convictions, not because he felt that a job in the Transport Division "would be a better job in the eyes of my draft board," as he testified at the trial of this case.

Hence, the Government concludes there was indeed a "basis in fact" for Mr. Storey's 1-A-O classification, and that it was not illegal, arbitrary or capricious.

VII

THE DEPARTMENT OF JUSTICE DID NOT BASE ITS RECOMMENDATION TO THE AP- PEAL BOARD ON AN ILLEGAL BASIS

Registrant contends that the Hearing Officer and Department of Justice illegally commented upon the validity of registrant's beliefs. Government counsel has reread both recommendations several times and can find nothing at all to support such a contention. Absolutely nothing appears in either report which could be remotely construed as the opinion of the Hearing Officer or Mr. T. Oscar Smith regarding the validity, goodness or badness of registrant's religious beliefs. Looking at the overall message carried in both reports, the only reasonable construction is that both writers feel that the registrant is since in his opposition to participation in combatant services, and to working in the area of blood transfusion or on Saturdays, but that he is not sincere in his claimed opposition to all other forms of non-combatant service. There is certainly not any comment on the validity of such beliefs,

and the provisions of *United States v. Seeger*, 380 U.S. 163 are complied with.

Furthermore, any recommendation made by the Department of Justice is not binding on the Appeal Board. Selective Service Regulation 1626.25(e) provides:

. . . the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, *but shall not be bound to follow*, the recommendation of the Department of Justice . . . [emphasis added] *Accord, Ashauer v. United States*, 217 F.2d 788 (9th Cir. 1954).

Hence, the Appeal Board had the authority to follow the Department of Justice's recommendation, to modify it, or to completely disregard it.

VIII

THE DEPARTMENT OF JUSTICE HEARING OFFICER DID NOT DEPRIVE APPELLANT OF ANY CONSTITUTIONAL RIGHTS TO WHICH HE WAS ENTITLED

Appellant contends he was deprived of his constitutional rights on grounds that the Hearing Officer did not advise him of a right to remain silent, a right to counsel, and a right to have counsel appointed if he were indigent. The government submits that said contention is without basis because (1) appellant was not under "custodial interrogation" at the time of his appearance before the Hearing Officer; (2) appellant *was* advised of his right to have an attorney present at the hearing; and, (3) the Hearing Officer had no duty to advise appellant of a right to court-appointed counsel under the law in effect at the time of trial.

1. The United States Supreme Court held in *Miranda v. Arizona*, U.S., 16 L.Ed.2d 694 (1966) that defendants must be advised of certain rights whenever questioned by law enforcement officers while under "custodial interrogation." The Court then went on to define the term as follows:

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

When appellant appeared before the Hearing Officer on December 4, 1963, he was not under "custodial interrogation" for the following reasons:

- a. Appellant had not yet committed any crime. He didn't commit a crime until five months later when, on June 9, 1964, he refused to be inducted into the Armed Forces. Hence, when he appeared before the Hearing Officer, he was *not* being investigated or interrogated for a crime which had already been committed, as in *Miranda* and the related cases.
- b. The questioning at the hearing was not conducted by "law enforcement officers." Rather, the hearing was administered by a private Seattle attorney who volunteers his services without fee on a part-time basis to the Department of Justice for the purpose of conducting such hearings.
- c. The purpose of the hearing was to ascertain facts upon which to base a recommendation as to the Appellant's sincerity in his claim to a conscientious objector exemption from military service. The purpose was to be objective and

unbiased, not to obtain a confession to a crime which had not even been committed.

- d. The Hearing was not held in a "police dominated atmosphere," at the local jailhouse, as in *Miranda* and the related cases, but in the relative calm of a private attorney's office. The appellant had been invited to "present witnesses in support of his claim" and was further advised of his right to "have an attorney, relative, friend, or other advisor present at the hearing." (Notice of Hearing contained on p. 8, Appendix D of Appellant's brief.) And the record indicates the appellant was in fact accompanied by a member of the Radio Church of God as a witness (EX 76), a far cry from the situation in *Escobedo v. Illinois*, 378 U.S. 478 (1964).
- e. The appellant was not under any legal compulsion to even attend the hearing, and could have walked out of the Hearing Officer's office at any time he desired during the course of the hearing.

Therefore, it appears obvious to Government counsel that appellant was not under custodial interrogation, nor had he been deprived of his liberty in any significant way at the time the hearing was conducted. Accordingly, the principles announced in *Escobedo*, *Miranda* and the related cases should not apply.

2. Appellant *was* advised of his right to have counsel present at the hearing. (Appellant's Brief p. 59 and Appendix p. 8 and 9). However, he chose only to bring a member of his church as a witness (EX 65).

3. The Hearing Officer had no duty to advise appellant of a right to court-appointed counsel if he were indigent because the hearing was held on December 4, 1963, and the trial of this case on December 6, 1965. *Johnson v. State of New Jersey*, U.S., 34 U.S. Law Week 4592 (1966) provides that the principle of *Miranda* requiring advice as to right to court-appointed counsel shall apply only to those cases tried subsequent to June 13, 1966.

IX

THE COURT DID NOT ERR IN EXCLUDING TESTIMONY OF APPELLANT'S WIT- NESSES AT TRIAL

The general rule is that the Court's review of a registrant's classification must be limited to the evidence which was before the Selective Service Boards and on which they acted. *Cox v. United States*, 332 U.S. 442, 68 S.Ct. 115; *Ashauer v. United States*, 217 F.2d 788 (9th Cir. 1954). Hence, the testimony of appellant's witnesses at trial could not be considered by the court.

CONCLUSION

The Government respectfully contends that all of the registrant's assertions regarding denials of procedural due process are without merit. The Court of Appeals for the Ninth Circuit stated in *Knox v. United States*, 200 F.2d 398 (9th Cir. 1952) :

Procedural irregularities which do not result in prejudice to the registrant are to be disregarded.

And, in *Shaw v. United States*, 264 F.2d 118 (9th Cir. 1959), the same Court stated:

An appellate court is not required to search the record with a microscope, in an effort to find minute but harmless flaws in the work of administrative bodies of the lower courts.

Regarding the applicable standard of judicial review of administrative decisions, the United States Supreme Court stated in *Witmer v. United States*, 348 U.S. 375 at p. 380:

It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgment on the weight of the evidence for those of the designated agencies. *Nor should they look for substantial evidence to support such determinations.* [Cases cited]. The classification can be overturned only if it has "no basis in fact." [Emphasis added]

The United States of America respectfully contends that there is sufficient evidence to constitute a "basis in fact" for the registrant's classification. Furthermore, he has been afforded every opportunity available under the law to prove his claim to exemption from non-combatant service, but has failed to do so. Accordingly, the Government respectfully urges that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL J. SWOFFORD

Assistant U.S. Attorney

DATED at Seattle, Washington
this 29th day of August, 1966.

MICHAEL J. SWOFFORD

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20932

KENNETH G. STOREY, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF

FILED

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APPELLANT'S REPLY BRIEF

INTRODUCTORY REMARKS¹

Counsel for Appellant sincerely feels that the Government has failed, due to the merits of Appellant's cause, to meet the basic arguments in the Opening Brief. Therefore, the arguments and cases set forth in the Opening Brief

1. In this Reply Brief (OB) shall refer to the Appellant's Opening Brief, (AB) to the Appellee's Answering Brief and (EX) to Government's Exhibit No. One.

will be relied on when any portion of the Government's Brief is not specifically commented on.

A note of warning. A major approach used by the Government throughout the Answering Brief is the selection and emphasis of certain facts to the absolute exclusion of others. This results in some misimpressions.

Therefore, it is essential to the merits and justice of Appellant's cause, that all the facts, in their chronological order, be kept in mind. The facts themselves will answer all the direct questions asked by the Government and refute the innuendos raised. Please see pages 3 through 8 of the Opening Brief.

ARGUMENT

I

The Local Board's Failure to Respond to Appellant's Inquiry, or to Refer Him to a Source for Advice—a Selective Service Appeal Agent or Advisor—Deprived Him of Crucial Counsel and Advice and Induced Him into the Very Circumstances upon Which Selective Service Is Denying His I-O Classification.

Government argues: That the local board had no *duty* to provide advisors under Selective Service Regulation 1604.14. (AB 8, 9).

Reply argument:

(1) This is a red herring. Nowhere does Appellant contend that the local board had a duty to appoint or post advisors. The Government is attempting to cloud the issue by conjuring up this point. It is obviously moot, because advisors were appointed and posted. (OB 4). Further-

more, the local board couldn't appoint an advisor under any circumstances. The Regulation vests the power in the Director of Selective Service.

(2) What the Appellant does contend on this point is clearly set forth in his Brief. The Appellant's argument is strengthened by the *Uffelman* case cited by the Government. It holds that one of the very reasons a failure to appoint an advisor does not violate due process is because the local board acts in that capacity. *Uffelman v. U. S.*, 230 F.2d 297 (9th Cir. 1956), at pages 300, 301.

Government argues: The Appellant wrote his local board and suggested his work at Boeing was connected with warfare (AB 9). They then state, "Why did he continue said employment after he *knew* this?" (AB 9-11).

Reply argument:

(1) This question is fully answered by the facts [OB 3, 4; 39(c)] and was even brought out in Appellant's testimony. (December 6 Transcript of Proceedings, pp. 29, 30). The Appellant simply expressed this belief upon first embracing the principles of his newly found religion. Subsequently he was advised by church members, also employed at Boeing, that his work was proper in the eyes of the Church. This is what prompted the Appellant to ask his local board and the Hearing Officer how Selective Service viewed his work at Boeing. (OB 4, 5).

(2) The Appellant's writing his local board and suggesting his work at Boeing was connected with warfare, is not the "hanging evidence," as suggested by the Government. To the contrary, it is evidence which further tends

to prove the unquestioned sincerity of the Appellant. It is just another piece of evidence to show that the Appellant would have terminated his job at Boeing immediately had Selective Service or the Department of Justice simply advised him what their hard-line unresilient policy was regarding this type of work.

(3) The Government keeps emphasizing that the Appellant “knew” the nature of his work. Yes, he did *know* that his work was proper in the eyes of his church. But he did *not know* how Selective Service viewed his work and that is exactly what he tried to find out. It is not *what he knew* that has resulted in the prosecution of the Appellant, but what *he did not know*—what was willfully withheld from him by Selective Service—that caused the problem.

Government argues: The Appellant wanted to continue in a “lucrative defense job.” (AB 11).

Reply argument:

(1) Was the Appellant in a “lucrative defense job”? Was he making more money as a draftsman on ground support equipment than he was making in the Civil Transport Division at Boeing? Was he making more money than he would be at any other job in the Seattle area? Was he making more money than he is at his present job? There is just no basis for this accusation.

(2) Appellant expressed his willingness to work under the I-W Work Program, the alternate form of service for conscientious objectors. (Ex. 155). He was over 23 years old when he appeared before the local board. Had

they given him a I-O at that time he would have been immediately eligible for assignment under the I-W Work Program working for the average rate of between .85¢ and \$1.25 per hour.

Government argues: What constitutes defense work is a "complex legal question."

Reply argument:

(1) If the question was too complex, the local board or the Hearing Officer should have at least told the registrant that they could not give him an answer or referred him to a Selective Service advisor or appeal agent.

II

The Appellant Was Denied Due Process When Ostensibly Derogatory and Adverse Evidence Was Placed Before the Appeal Board That He Was Never Informed of nor Afforded the Opportunity to Rebut.

No place does the Government deny that the contents of the letter in question were derogatory. No place do they contend that the Appellant had knowledge of it.

Government argues: Other rebuttal was filed with no thought of the derogatory letter in mind. That this rebuttal evidence incidentally concerned the derogatory information and, therefore, satisfied Appellant's right to directly and intelligently rebut the adverse evidence against him. (AB 12, 13).

Reply argument:

(1) The Government's argument is repugnant to the fundamental concepts of due process. To clearly understand it is to reject it.

“Basic to the very idea of free government and among the immutable principles of justice which no State of the Union may disregard is the necessity of due ‘notice of the charge and an adequate opportunity to be heard in defense of it.’” The Constitution of the United States Analysis and Interpretation (88th Congress 1st Session Document No. 39), p. 1267 citing *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

The Government would turn the Selective Service proceedings into a game of Blind Man’s Buff contrary to the admonishment in *Simmons v. U. S.*, 348 U.S. 397 at 405.

(2) The Government is asking the Court to assume that the Appellant had no further evidence available to rebut the secretive letter. They say surely the other letters filed were “ample to rebut one possible derogatory letter.” (AB 13). They suggest that the counting of letters supplants the weighing of evidence intelligently submitted. The Government, however, does not consider the secret derogatory letter as being rebutted. They attempt to use it on page 10 of their Brief to the detriment of Appellant’s position.

III

The Local Board Misinterpreted and Misapplied the Regulations When It Considered the New Information, Filed by Appellant, under the Erroneous Impression It Had to Warrant the Authority of the State Director to Reopen.

IV

The Local Board Acted Arbitrarily and Without a Basis in Fact When It Refused to Reopen the Appellant's Classification After Receiving New Information Regarding a Change in His Status.

It should be noted that the Government's attempt to merge these two distinct propositions has resulted in their avoiding the arguments presented.

Government argues: The new evidence filed by Appellant was considered by the Appeal Board. (AB 16).

Reply argument:

(1) A registrant has at least two opportunities to achieve a requested classification. First before the local board, then, in the event of an adverse classification, by the Appeal Board [50 Appendix 460(b)(3)]. Then, even after the Appeal Board has acted, the local board must reopen a classification upon new evidence being filed (32 CFR 1628.26(b); 1625.2). Upon reopening the registrant is entitled to another personal appearance hearing before his local board. (32 CFR 1625.11; 1625.13).

The Government suggests that the Appellant's right to have his new evidence first considered by the local board, the first step in the orderly process of Selective-Service procedure, be circumvented as of no consequence.

This Court has labeled classification by the local board as "the keystone of the process of induction." *Ayers v. U. S.*, 240 F.2d 802, 809 (9th Cir. 1957). And that "classification by the local board is an indispensable step in the process of induction." *Knox v. U. S.*, 200 F.2d 398, 402 (9th Cir. 1952).

As this Court stated in *Franks v. U. S.*:

"We pointed out the fact that in consideration of a claim of conscientious objection and of the question whether a registrant should be so classified, *the personal appearance of the registrant before the local board is of major and commanding importance*. The Appeal Board, notwithstanding it has the aid of a written report from the Hearing Officer, has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service. Therefore, *a registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something that cannot be cured through the action of the Appeal Board. . . .*"

"This brings us to the conclusion that the failure of the local board to comply with the Regulation referred to renders the registrant's classification and his induction order invalid. It was incumbent upon the U.S. in this prosecution to prove a valid induction order as a basis for Appellant's conviction." 216 F.2d 266, 270 (9th Cir. 1954). Also see *Knox v. U. S.*, 200 F.2d 398 (9th Cir. 1952); *U. S. v. Craig*, 207 F.2d 888, 891 (3rd Cir. 1953).

Government argues: That the Appellant did not request a reopening in his new evidence. (AB 16).

Reply argument:

(1) Counsel is fully aware of the peril in going outside the record. He has, however, in deference to the limited funds of the Appellant only had extracts of the testimony prepared. As an officer of the court counsel states that this very point was raised by the Government during the hearing of January 21, 1966, and that the Trial Court rejected it. (Transcript of Proceedings of January 21, 1966, p. 3). As the Government did not preserve this point on appeal they are now barred from having it reviewed. If the Government does not concede this point, Appellant moves the Court to have the entire argument of counsel on said date prepared. And, inasmuch as the same was inadvertently omitted, to have the Clerk of the District Court transmit the same to Appellate Court under Rule 75(b) of the Rules of Civil Procedure.

(2) This point is further without merit in that the Appellant *did* request a reopening. In his letter the Appellant stated, "I *appeal* to you to grant my desired classification of I-O." (Ex. 123). Not only was the wording of this sentence in and of itself tantamount to a request for reopening, but in addition thereto, the case of *Wyman v. LaRose*, 223 F.2d 849 (9th Cir. 1955) held that although the registrant used the word "appeal" in his letter, that "the context clearly showed that Appellee was not thereby taking an appeal, but was, in effect, requesting the local board to reopen his classification and consider it anew."

(3) Even if no request for reopening was made, it would be totally irrelevant to the facts in our case. The reason being, in our case the board, in fact, did convene to consider the evidence. The wrong under our facts is that they misapplied the law in their refusal to reopen. In the cases cited by the Government the local boards never convened to consider the evidence and this was allegedly justified by the fact that no request was made for reopening.

Government argues: That the latter part of Selective Service Regulation 1625.2(b) is applicable and that the local board need not reopen a classification after an induction order has been sent unless the local board specifically finds that there is a change in circumstances beyond the control of the registrant.

Reply argument:

(1) The section of the Regulation relied upon by the Government is only applicable when the alleged new facts have occurred *after* the notice of induction has been sent. In our case the new evidence occurred *before* and was likewise filed with the local board *before* the induction order was issued.

VI

The I-A-O Classification Given Appellant by the Appeal Board Was Illegal, Arbitrary, Capricious and Without a Basis in Fact.

Again Appellant would renew his request that the Court keep all the facts in mind in their chronological order in reviewing this section. [OB 3-8; 39(c)].

Government argues: The local board denied the Appellant's conscientious-objector claim based in part on his demeanor and credibility. (AB 21).

Reply argument: There is no citation of authority for this statement. It is unfounded and unwarranted. It is an abortive attempt to create a question of Appellant's credibility when in fact it is impeccable.

Government argues: The Hearing Officer stated Appellant appeared to be embarrassed and uncertain in his attempted justification of his employment at Boeing. (AB 21).

Reply argument:

(1) Appellant's work at Boeing was in accord with his religious belief. The Hearing Officer found the Appellant to be *sincere* in his representations as to his religious training and belief. (OB App. B, p. 4). The only thing Appellant was "uncertain" about was how Selective Service viewed his work at Boeing. As we have seen, he attempted to resolve this uncertainty with both the local board and Hearing Officer but to no avail.

Government argues: That Appellant was "given every available opportunity to prove his claim . . . but failed to convince anyone." That Appellant's case was not based on "one isolated fact."

Reply argument:

(1) The local board failed to reopen Appellant's classification so he could personally appear and convince them of the sincerity in his motivation for quitting Boeing. Both the local board and the Hearing Officer failed to notify the Appellant of the hard-line policy followed regarding defense

work so as to afford him the *opportunity* to quit. The Appeal Board failed to notify the Appellant of the derogatory letter so as to afford him the *opportunity* to rebut it.

(2) The Government does only have "one isolated fact" on which it is attempting to base its I-A-O classification and that is the employment at Boeing. What other fact justifies such a classification?

(3) The Appellant did convince the Hearing Officer of his claim for exemption. He found him to be sincere in the representation of his religious beliefs and recommended "that he not be exempted from . . . service of an assigned public nature. . . ." (OB App. B, p. 4).

VII

The Department of Justice Based Its Recommendation to the Appeal Board on an Illegal Basis When It Stated There Was Nothing in Appellant's Religious Training and Belief That Would Prohibit Him from Service in a Noncombatant Capacity

Government argues: The Appeal Board was not bound to follow recommendation of Department of Justice and cites *Ashauer v. U. S.*, 217 F.2d 788 (9th Cir. 1954).

Reply argument:

(1) The rationale of the 1954 Ashauer case was supplanted by the Supreme Court case of *Sicurella v. U. S.*, 348 U.S. 385, 391 (1955). Ashauer is also distinguished on the facts because the Court stated on page 791 that there were "factors in the case which militate against assuming the Appeal Board relied on the recommendation."

IX

**The Court Erred in Sustaining the Government's Objection
to the Introduction of Testimony from Certain of
Appellant's Witnesses.**

Government argues: That the exclusion of the testimony of Appellant's witnesses was proper because the Court is limited to the evidence which was before Selective Service. They cite the cases of Cox and Ashauer.

Reply argument:

(1) The Ashauer case reverses a judgment of conviction and holds for the defendant. The Court merely states on page 792 that the Government cannot use alleged discrepancies in the defendant's testimony to destroy the valid claim he already made. Again, the witness was allowed to testify and was not deemed disqualified.

(2) The Cox case was considered with one Thompson. Cox actually was permitted to testify. Thompson was not allowed to testify. But the question is, what evidence did the Court refuse to receive? On page 446, we read, ". . . (T)hat Thompson was not allowed to testify *concerning his duties as a minister.*"

The Cox case is distinguished in that the Appellant never attempted to introduce evidence the sole purpose of which was to further augment the *sincerity* of his conscientious objector beliefs. The purpose of the testimony of Appellant's witnesses was solely to show a violation of due process or simply elaborate and tie together the facts and documents already in the file.

To deny this right to a registrant would mean that it would impute to him, as a layman, the duty of knowing every single important and relevant fact that will be of importance to him at trial, and require him to file it before Selective Service. The Appellant refers the Court to the dissenting opinions of Justices Murphy and Rutledge on page 457.

(3) The Court should also note that the legal reason now given to sustain the Court's refusal of admitting such testimony, were not the reasons given in their objection to such testimony. (OB 11, 12).

(4) In the case of *Elder v. U. S.*, 202 F.2d 465 (9th Cir. 1953), on page 467 the Court refused to receive certain testimony. The defendant failed to make an offer of proof. The Appellate Court held the refusal to admit the evidence was not error, *only* because no offer of proof was made upon which they could determine if it was of a prejudicial nature. They did not automatically refuse it because it is barred ipso facto. The evidence had to do with the fact that the Hearing Officer made an incomplete and incorrect report of the hearing.

(5) The Government's argument would be tantamount to disqualifying all witnesses. This is not the case, for we see that in Cox, Ashauer and Elder witnesses were permitted to testify.

CONCLUSION

"In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, (which we will discuss hereafter), then we must view the record in the light most favorable to the appellant as we proceed to construe its meaning." *Franks v. U. S.*, 216 F.2d 266, 269 (9th Cir. 1954).

But regardless of how we view the record there is *at least* a reasonable doubt as to his guilt. Nowhere is his sincerity questioned. Nowhere is there found a basis in fact.

Therefore, counsel for the appellant ardently requests that the judgment of the Trial Court be reversed.

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH K. HELGE

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KENNETH G. STOREY, JR.,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 20932

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH G. STOREY, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20932

PETITION FOR REHEARING

*To the Honorable Walter Pope, Chief Judge, and
Circuit Judges Walter Ely and Charles Merrill.*

Appellant, Kenneth G. Storey, Jr., hereby petitions for a rehearing to reconsider the judgment entered in this action on December 5, 1966, for the following reason:

Counsel very respectfully suggests that there is a misapplication of law in the Court's Opinion. As clarification of the point is essential to Appellant's cause, counsel feels obligated, with all due respect to the Court's eminence, to call attention thereto.

I. The suggested misapplication is found on pages 6-8 of the Court's slip Opinion. It concerns the failure of the local board to reopen after the registrant filed certain new information. The Court's conclusion was that this was immaterial in that any error by the local board was rectified by the Appeal Board's *de novo* classification.

There is a vivid distinction between the cases cited by

the Court on page 8 of its Opinion and the present case. In the cases cited by the Court the local board committed some error in the process of classification *before* an appeal was taken. The alleged error was then taken before the Appeal Board by the *subsequent* appeal.

In Appellant's case the error relied upon took place after he appealed. Therefore the error was never presented to or passed upon by the Appeal Board.

The said error relied upon was that the local board *denied* the Appellant *due process* by failing to reopen his classification. This occurred when the Appellant filed new information, one point of which was that he now knew his job at Boeing was wrong, in his conscience's sight, and that he had terminated his job there (Govt. Ex. 1, p. 55). This was filed March 31, 1964, subsequent to his hearing with the local board of May 20, 1963 (Govt. Ex. 1, p. 10). Said information evidenced a change of status from I-A-O to I-O. Not being clearly frivolous, it demanded, at least, a reopening and a hearing. See cases cited, Appellant's Opening Brief, pp. 28, 29; *U. S. v. Burlich*, 257 F. Supp. 906, 910, 911 (1966).

The hearing that would have followed such a reopening would have been of major and commanding importance to the Appellant in that the local board could have visually observed him, considered his explanation for working at Boeing and thereby ascertained his true attitude of repentance and sincere change of heart in quitting his job at Boeing (Transcript of Dec. 6, 1965, pp. 35, 36). As this very Court said: "The Appeal Board . . . has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service." *Franks v. U. S.*, 216 F. 2d 266, 270 (9th Cir. 1954).

As can be clearly seen, this error of refusing to reopen was never taken before the Appeal Board nor considered

by them, so it could not possibly be said that its action cured the error in question.

II. Neither was the local board's error obviated by the fact that the new information was also before the Appeal Board. This would be immaterial. The Regulations grant each registrant the right to have his claim or new information considered by two separate bodies — the local board and the Appeal Board. He is afforded two distinct opportunities of having his request granted. The consideration of information by the Appeal Board cannot usurp or supplant the right of a registrant to have his local board review his claim. The Regulations provide:

“It is the *local board's responsibility* to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the *satisfaction of the local board*. The *local board* will receive and consider all information, pertinent to the classification of a registrant, presented to it.” (32 CFR 1622. 1(c))

Please also see 32 CFR 1626.26(b); *Knox v. U. S.*, 200 F. 2d 389, 401, 402 (9th Cir. 1952); *Ayers v. U. S.*, 240 F. 2d 802, 809 (9th Cir. 1957) and *U. S. v. Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953).

For an analogous situation where the registrant filed new information with the local board while his case was before the Appeal Board see *U. S. v. Henderson*, 223 F. 2d 421 (7th Cir. 1955).

III. Attention must also be directed to the fact that the Appellant did request a “reopening.” This was in his letter in which he stated, “I appeal to you to grant my desired classification of I-O.” (Govt. Ex. 1, p. 123). This was held to be tantamount to a request for a reopening in the case of *Wyman v. LaRose*, 223 F. 2d 849 (9th Cir. 1955). Please

also see *U. S. v. Craig*, 207 F. 2d 888, 891 (3 Cir. 1953); *Townsend v. Zimmerman*, 237 F. 2d 376, 378 (6th Cir. 1956); *ex parte Fabiani*, 105 F. Supp. 139, 148 (E. D. Pa. 1952).

IV. The Court summarily denied the application of Escobedo and Miranda on the grounds that the administrative proceedings for conscientious objectors is noncriminal in character. An analogous point is now pending on appeal before the United States Supreme Court: In application of *Gault*, 17 L.Ed.2d III. There a Defendant in a Juvenile Court proceedings was not advised of his rights regarding self-incrimination because the proceedings were considered noncriminal in nature.

It is suggested that the decision in the *Gault* case will be controlling on this point so it is requested that the Court withhold determination until the handing down of that decision.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATION

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: December 15, 1966

/s/Ralph K. Helge

Ralph K. Helge, *Attorney*

No. 20939 ✓

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

1965 Term

WESTERN CONSTRUCTORS, INC., a
corporation,

Counterclaimant-Appellant,
vs.

SOUTHERN PACIFIC COMPANY, a
corporation,

Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC., a
corporation,

Defendant-Appellant,
vs.

SOUTHERN PACIFIC COMPANY, a
corporation,

Plaintiff-Appellee.

Appeal from the
United States
District Court for
the District of
Arizona

BRIEF OF COUNTERCLAIMANT-APPELLANT
AND DEFENDANT-APPELLANT
WESTERN CONSTRUCTORS, INC.

SNELL & WILMER
JENNINGS, STROUSS,
SALMON & TRASK

Attorneys for Counterclaimant-
Appellant and Defendant-
Appellant, Western Constructors,
Inc.

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Defendant-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a
corporation,

Plaintiff-Appellee.

Appeal from the
United States
District Court for
the District of
Arizona

**BRIEF OF COUNTERCLAIMANT-APPELLANT
AND DEFENDANT-APPELLANT
WESTERN CONSTRUCTORS, INC.**

JURISDICTION

(a) The District Court.

Southern Pacific Company, (hereinafter referred to as "Southern Pacific") filed its complaint in the United States District Court for the District of Arizona in three counts seeking money damages against Western Constructors, Inc., (hereinafter referred to as

"Western") in the sum of \$700,000.00 plus \$50,000.00 attorney's fees claimed to have been suffered by Southern Pacific Company through the derailing of one of its freight trains near Picacho, Arizona, October 24, 1963, for which loss it alleged Western was legally liable. One other corporation and two individuals were also named as defendants, the corporation as a citizen of Arizona, with its principal place of business in Arizona, and the two individuals as citizens of Arizona. The cause, as tried, involved only the issues of liability of Western to Southern Pacific upon Count Two of the Complaint, for indemnity, and of Southern Pacific to Western upon Western's counterclaim.

Western filed its counterclaim against Southern Pacific for money damages in the sum of \$30,000.00 claimed to have been suffered by Western in said freight train derailment for which it alleged Southern Pacific was liable.

It was alleged in the complaint and admitted by all parties that Southern Pacific was a Delaware corporation with its principal place of business in California and that Western was a Texas corporation with its principal place of business in Texas. (T.R. 1,2,3,4,12,16,17).

The district court's jurisdiction therefore rested upon the authorization contained in Section 1332, Title 28 U.S.C. The requisite diversity of citizenship between plaintiff and defendants and between counterclaimant and counterdefendant was alleged and in good faith admitted by Southern Pacific and Western.

The District Judge, by stipulation of the parties, severed the trial of the liability issues from the damage issues, and only the liability issues were tried to a jury, beginning February 8, 1966. The pleadings alleged that the amount in controversy, exclusive of interests and costs, exceeded \$10,000.00, which allegations were admitted, and depositions and other discovery evidence were on file indicating the extent of the substantial money damages involved. The District Judge, with the agreement of the parties, found at the pretrial there were no jurisdictional issues. (Pretrial Trscpt. Feb. 2, 1966). The evidence upon the liability trial showed

very severe property damage plainly resulting from the accident of October 24, 1963 far in excess of the \$10,000.00 jurisdictional requirement.

(b) This Court.

The District Judge directed a verdict in favor of Southern Pacific (and entered judgment thereon) finding that Southern Pacific was entitled to judgment against Western for its losses and denying Western recovery on its counterclaim against Southern Pacific for its losses. (R.T. 447, 448; T.R. 28, 29, 30).

The written Partial Final Decree and Order Directing Entry of Judgment entered by the Court provided, pursuant to the provisions of Rule 54(b), Federal Rules of Civil Procedure, *inter alia*, that: (T.R. 29)

"Pursuant to Rule 54(b) Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs that judgment be entered by the Clerk in favor of the plaintiff and counterdefendant, Southern Pacific Company and against the defendant and counterclaimant, Western Constructors, Inc., that said plaintiff have judgment upon its complaint for the losses and damages it legally sustained by reason of the accident of October 24, 1963, near Picacho Junction, Arizona, in such amount as the Court shall hereafter fix and determine and that counterclaimant take nothing by its counterclaim and that the same is hereby dismissed with prejudice."

and, pursuant to the provisions of Section 1292(b), 28 U.S.C., further provided: (T.R. 29, 30)

"Pursuant to Section 1292(b), 28 U.S.C., the Court is of the opinion that the Order and Partial Final Judgment hereby approved, determined and ordered entered by the Clerk of this Court involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order and Judgment may materially advance the ultimate termination of the litigation."

The Partial Final Decree and Order Directing Entry of Judgment was entered by the Clerk on March 21, 1966, and on or prior to March 31, 1966, Western filed in this Court its "Applica-

tion for Permission to Take an Appeal Under Section 1292(b) of Title 28, United States Code, Annotated" which application was considered by this Court April 11, 1966, and such permission was granted.

Western, as counterclaimant, filed its Notice of Appeal to this Court from the judgment denying it recovery upon its counterclaim on March 23, 1966 and Bond for Costs on Appeal likewise on March 24, 1966. (T.R. 31, 32).

Western, as defendant, pursuant to the permission granted by this Court, filed its Notice of Appeal to this Court from the Partial Final Judgment and Order Directing Entry of Judgment finding it liable to Southern Pacific for its damages and its Bond on Appeal on April 15, 1966. (T.R. 39, 40, 41, 42). Counterclaimant-Appellant's Concise Statement of Points to be Relied Upon and Designation of Contents of Record on Appeal were filed March 29, 1966. (T.R. 34, 37). Western as defendant-appellant filed its Concise Statement of Points on April 15, 1966 (T.R. 43) and its Designation of Contents of Record on Appeal on April 19, 1966. (T.R. 46).

The jurisdiction of this Court as to the appeal of counterclaimant is conferred by Section 1291, 28 U.S.C. and as to the appeal of Western as defendant is conferred by Section 1291 and 1292(b), 28 U.S.C.

STATEMENT OF THE CASE

In 1963 the Arizona Highway Department of the State of Arizona was engaged in constructing U. S. Interstate Highway No. 10 between Tucson, Arizona and Phoenix, Arizona, in the vicinity of Picacho or Picacho Junction, Arizona which is roughly half way between Phoenix and Tucson. (R.T. 91-105).

The main line of the Southern Pacific Company between Tucson and Gila Bend, Arizona, passes through this area, running approximately in an east-west direction and generally paralleling the proposed route of Interstate No. 10 to the south of U. S. Interstate No. 10.

In the spring of 1963, the Arizona Highway Department

called for bids for the construction of a segment of this highway and Western was awarded the contract. (Deft's R in Evid.) (R.T. 92). As a part of the Contract Proposal (Deft's R in Evid.) the Arizona Highway Department issued its "Memo to Contractors" (Deft's S in Evid.) in which contractors proposing to bid were advised that a private crossing would be made available to contractors so that earth could be moved across the railroad from the north of the railroad right of way since this was to be the source of earth used to build up the grade of the new highway. (R.T. 99-100).

This Memo To Contractors provided, inter alia:

"The State proposes to provide a crossing of the Southern Pacific Company tracks and to furnish ingress from the highway right-of-way by way of this crossing to Pit (1), Serial No. 5058.

"The State has made application to the Southern Pacific Company for a railroad crossing. It is expected that this application will be formally approved within six to seven weeks.

* * * * *

"The Southern Pacific Company will require that the contractor enter into an agreement with the Company covering the crossing.

"No direct payment will be made for any of this work, but the cost to the contractor for the work to be performed by the Railway Company, the cost of all flagmen, protective blanket, any insurance requirements that may be specified by the Company and all other costs incurred in connection with the use of this crossing shall be considered as included in the cost of the materials removed from Pits (1) and (2).

"Please attach this memo securely to your proposal pamphlet and be guided accordingly."

Pursuant to the above Memo Southern Pacific prepared and sent to Western, for its signature, a "Private Roadway Agreement" (Plf's Ex. 4 in Evid., R.T. 43) and Western executed and returned the agreement. (R.T. 101). The agreement (Par. 6) contained this provision:

"In consideration of the exposure to hazard of the operations

of Railroad by reason of the construction, maintenance and use of said roadway, Licensee does hereby release and agree to indemnify and save Railroad harmless from and against all liability, claims, costs and expenses for loss of or damage to the property of either party hereto or of third persons, and for injuries to or deaths of Licensee or the agents, employees or invitees of Licensee or third persons or the employees of Railroad caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of Railroad."

Under this agreement both Western and Southern Pacific had responsibilities in connection with the construction and use of this crossing *wholly unrelated to the activities of Southern Pacific in operating its trains over its tracks.*

On October 24, 1963, the work was in progress. Carryalls, large earthmoving equipment, were working, crossing over this private roadway crossing to a "borrow" pit on the north side of the railroad tracks, loading a load of dirt and returning south over the tracks to dump and spread this load of dirt to build up the new highway grade. These carryalls averaged about 100 crossings over the tracks per hour. (R.T. 413). The access roadway from the area of U.S. No. 10 under construction and to which the dirt was being hauled to this borrow pit ran approximately north and south and hence crossed the railroad tracks at about right angles to it. (Plf's Exhibit 3C in Evid., R.T. 95).

Harold Kness, an employee of Western, was operating one of these carryalls on October 24, 1963. (R.T. 122). He had driven this same carryall over the crossing approximately 800 times (R.T. 119) and it had never stalled, stopped or otherwise functioned imperfectly in crossing over the tracks in question. (R.T. 115, 119, 120).

The collision occurred at about 4:20 P.M. on October 24th (R.T. 204, 122) immediately east of the overpass (about 300 feet) which took the then existing state highway over the railroad tracks and at the private crossing constructed pursuant to the State Highway permit. This carryall driven by Kness was

returning empty for a load of dirt when it unexpectedly stalled on the railroad tracks (R.T. 125-130) and was struck by the Southern Pacific freight train. There is no claim that Western had any notice that such stalling might occur or that it was otherwise negligent in connection with this occurrence.

The engineer in charge of the diesel engines pulling the train was Lealon C. Henderson. (R.T. 323). Mr. Henderson had been over this route many times during his years as engineer, over a hundred times a year. (R.T. 324). He saw the construction of the private roadway and the crossing of the tracks by the carryalls. (R.T. 327-328). He considered the crossing as dangerous since regularly carryalls were crossing in front of oncoming trains too closely. He termed it "tagging" (R.T. 329, 330) and complained to the trainmaster at Gila Bend. (R.T. 333). He said "some one is going to get hurt." (R.T. 333).

The only action Southern Pacific took to warn Western of this condition was one phone call to the Phoenix office to complain that the carryalls were not stopping before crossing the tracks. (R.T. 414, 415). The Private Roadway Agreement required that Western maintain a flagman at the crossing "for the control of vehicular traffic" but it also provided that this flagman must be "satisfactory" to Southern Pacific. No complaint was made by Southern Pacific to Western that the flagman, Avila, was unsatisfactory. (R.T. 413-415). Southern Pacific did not issue any instructions or otherwise undertake to assure the safe operation of its trains while this dangerous condition obtained. (R.T. 134-135, 273-274, 301-302, 328, 413-415).

The only precaution Henderson took to avoid injury to life and limb of "someone" was to blow his whistle longer and harder (R.T. 336) and reduce his speed (through the area) from 65 to 63 miles per hour, which reduced his speed less than two feet per second. (R.T. 337, 352). Mr. Henderson admitted this had no appreciable effect upon his ability to control the train (R.T. 352) and that his primary reason "in holding your speed down below 65 (miles per hour) when you went through there was

to be sure you (he) were not in violation of the railroad regulation." (R.T. 349). In other words, if he ran over and killed someone he wanted to be sure he did so within the letter of the railroad's regulation.

Q. "And your primary reason for wanting to be sure that you were within the regulation of the railroad was to avoid criticism, if an accident happened, wasn't it?

Was that not a fact?

A. That is a fact." (R.T. 349-350).

The distance from Tucson to Gila Bend by track miles was 131 miles and the running time varied from 2 hours 15 minutes to 2 hours 25 minutes. (R.T. 325). The train was not on any regular schedule and it did not meet any time schedule at Gila Bend (R.T. 324, 325) — it simply changed crews and went on to Yuma, Arizona. Approaching this private roadway crossing from Tucson the crossing was in plain view for as far as the human eye could see — at least 5 miles. (R.T. 326).

The engineer Henderson, at and prior to the accident in question, operated this train consisting of 2 diesel engines and 80 loaded freight cars at a speed in excess of 60 miles per hour as he approached the private crossing (R.T. 357) *without keeping any lookout ahead for vehicles which might be on or approaching said crossing.*⁽¹⁾ This indifference of the engineer to the possibility of injury to anyone on or crossing the railroad tracks continued to the point of collision, or substantially that point.

Based upon the testimony of the engineer given under oath on three different occasions, three versions of how the accident came

(1) The Court's attention is directed to the fact that the statement of the case to this point has been a recitation of the facts, largely undisputed, but that this last statement and the balance of this statement of the case is based upon the evidence and reasonable inferences therefrom, favorable to Western, which the jury might have found and drawn. From this point on appellant invokes the rule that, in considering a motion for a directed verdict in a case tried to a jury, the trial judge shall accept all evidence received and all reasonable inferences therefrom favorable to the party against whom the motion is urged as true and as if such inferences were in fact made. Appellant, likewise, will apply the rules "to look is to see" and "false in one, false in all" (See Post pp. 19-20 "Argument") in presenting the ensuing fact statement.

about, each quite different from the other, could have been found by the jury. Speculation as to which version would or should have been accepted by the jury is profitless since certain facts plainly could have been found, and if found, would clearly support a finding by the jury of wanton carelessness on the part of the *railroad* and Henderson.

1. The ponderous carryalls (Deft's C and H in Evid.) were constantly crossing over the railroad tracks at the rate of approximately 100 crossings per 60 minute period or one every 36 seconds. (R.T. 413).

2. A further dangerous condition existed at the crossing due to the frequency of the crossings and to either (a) failure of the flagman to properly control vehicular traffic; (b) failure of drivers to obey the flagman's traffic directions, or both (a) and (b).

3. The engineer reported to the trainmaster at Gila Bend that "somebody was going to get hurt" at the crossing; (R.T. 333) and testified " * * you were of the opinion that there was likelihood of a collision, right?" Answer (by Henderson) "Yes, sir." (R.T. 334).

4. The carryall was stalled on the crossing in plain sight of the oncoming train and its personnel when the train was at least a mile to a mile and one half away. (R.T. 127-128, 357, 381, 264, 266, 243-247).

5. The train was then traveling in excess of 60 miles per hour. (Deft's Ex. V in Evid.; Appellant's reproduction of Exhibit V in Evid. showing the train's speed prior to and at the point of collision, is reproduced in the Addendum herein as Exhibit 1; R.T. 336-337, 357, 274).

6. The train was still traveling at the same speed when it struck the carryall. (Deft's Ex. V in Evid., R.T. 195, 220; Exhibit 1 in Addendum herein).

7. The engineer made no real effort to slow or stop the train until the collision or so close thereto as to not materially slow the

train. (Deft's Ex. V in Evid., R.T. 360-365, 373, 303, 276-277, 287) (Exhibit 1 in Addendum herein)

8. The carryall was almost off the track; only its "stinger," an iron bar sort of protrusion extending out from the rear of the tractor and used as a ramrod for pushing, was one to two feet onto the south track of the railroad. (R.T. 167, 168, 183, 185, 372).

9. The carryall weighed 70,000 pounds empty. The velocity of the train was so great that it literally spun the carryall around in the air and it struck the train in spinning and ended up facing east after the collision. (R.T. 196, 198).

10. The train's speed tape (Deft's Ex. V in Evid.) (Exhibit 1 in Addendum herein) shows that approximately one and one half miles prior to the collision the train speed was reduced to somewhat above 60 miles per hour and that the train continued at this speed practically to the point of impact with the carryall.

11. Either the engineer was keeping no lookout ahead for traffic at the crossing practically to the point of collision or he was proceeding with reckless indifference to the consequences of his conduct to life and property.

The complaint of Southern Pacific as filed was in three counts. Count One asserted a claim based upon Western's asserted negligence, Count Two claimed contract indemnity against Western and Count Three asserted a claim for breach of a contractual provision of the Private Roadway Agreement whereby Western agreed not to "obstruct" passage of Southern Pacific's trains. Southern Pacific dismissed Count One and Count Three was also dismissed without prejudice (Pretrial T.R. No. 17, p. 8; R.T. 30) and hence only the contract issue presented by Count Two of Southern Pacific's complaint and the negligence charge made by Western in its counterclaim against Southern Pacific were tried.

The District Judge ruled prior to trial that the indemnity provision of the Private Roadway Agreement (Plf's Ex. 4 in Evid.) was valid and obligated Western to pay Southern Pacific's losses unless Southern Pacific was guilty of wanton or gross negligence which was a cause of the collision. (Pretrial, T.R. No. 17, p. 8).

The District Judge held an indemnity agreement was not enforceable upon public policy grounds if wanton or gross negligence on the part of Southern Pacific was involved. *Thomas v. Atlantic Coast Line*, 201 F.2d 167 (CA 5, 1953); *Northwestern National Casualty Co. v. McNulty*, 307 F.2d 432, (CA 5, 1962); 20 A.L.R. 2d 711, 717; and further held over the vigorous objections of Western that Western, having admitted its equipment was on the crossing when the accident occurred, a prima facie case was made out for Southern Pacific and Western had the burden of going forward and of proving gross or wanton negligence on the part of Southern Pacific.

Western completed its case in defense of the Southern Pacific claim and in support of its counterclaim and rested. Southern Pacific moved the Court to direct a verdict in its favor which motion, after argument, the Court granted, (R.T. 447, 448) and entered judgment accordingly. (T.R. 28, 29, 30).

SPECIFICATION OF ERRORS RELIED UPON

I. The trial judge erred in directing a verdict against Western finding it liable to Southern Pacific for its damages and denying Western recovery against Southern Pacific upon its counterclaim for its damages for the reasons:

A. The evidence, including reasonable inferences therefrom, was clearly sufficient to raise a question for determination by the jury as to whether or not Southern Pacific in the operation of its train at and prior to the time of the collision was guilty of wanton carelessness which was the proximate cause of the collision and its losses and the losses of Western and hence the indemnity agreement was inapplicable and voided as against public policy.

B. The Court had erred in placing upon Western the burden of proof as to the fact of Southern Pacific's wanton negligence and hence it erred in directing a verdict against Western for its asserted failure to carry that burden.

C. The indemnity agreement, (Par. 6, Plf's Ex. 4 in Evid.)

properly construed did not indemnify Southern Pacific (and was not intended to indemnify Southern Pacific) against losses arising from and caused by its own negligence and that of its employees in the operation of its trains, which negligence was not interrelated with and which did not arise out of Southern Pacific's negligence in the construction, maintenance and operation of the crossing in question.

D. The indemnity agreement contained in Plf's Ex. 4 in Evid. (Par. 6) was so redundant and prolix and of such confusing grammatical structure as to be ambiguous and hence since reasonable minds could reach different conclusions as to its meaning, the District Judge had erred in holding, as a matter of law, that it obligated Western to Southern Pacific for its losses directly and proximately caused by Southern Pacific's negligence rather than being caused by or arising out of the presence or use of the crossing and hence erred in directing a verdict against Western.

E. The indemnity agreement did not clearly and "beyond peradventure of a doubt" indemnify Southern Pacific against losses suffered by it in the area of the private crossing due to its negligence and that of its employees which losses were not proximately "caused by" and did not proximately "arise out of" the presence, maintenance, use or removal of said roadway but which losses were only remotely caused by and only remotely arose out of the presence, maintenance and use of said roadway. Hence the District Judge erred in holding such indemnity agreement applicable to these losses as a matter of law and directing a verdict in favor of Southern Pacific.

II. The trial judge erred in entering judgment in accordance with the order of directed verdict for all of the reasons given above supporting the statement that the District Judge erred in directing a verdict against Western and in favor of Southern Pacific.

ARGUMENT

The Court Erred in Directing a Verdict Against Western

This is a diversity case. The decisions of the Arizona State Appellate and Supreme Courts as to the circumstances under which

a jury may find a railroad guilty of wanton negligence in operating its trains are therefore persuasive and should have furnished the trial judge guidance.

In *Guaranty Trust Co. of New York v. York*, (1945) 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079, 2086, the United States Supreme Court said:

"In essence, the intent of that decision (*Erie*) was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. The nub of the policy that underlies *Erie* * * * is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away should not lead to a substantially different result."

See also: *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (CA 5) (1960)

First off, it should be noted that Arizona, in keeping with the weight of authority, expects that a railroad company shall recognize and respect the obligation it has, because of the unmanageable force it puts into motion in operating its trains, that it must "exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably to be anticipated."

In *Southern Pacific Company v. Bolen*, 76 Ariz. 317, 264 P.2d 401, our Supreme Court first stated the rule, (as applicable to a technical trespasser in that case) and quoted with approval from *Ft. Worth & D.C.Ry.Co. v. Longino*, (Tex.Civ.App., 118 S.W. 198, 201) as follows:

"We take it to be well settled that railroad companies are charged with the duty of *exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be*; and in our judgment it can make no difference, so far as the duty of the railroad company is concerned, whether

such persons are technically to be classed as *trespassers, licensees, or persons using the company's tracks as of right*. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably to be anticipated. * * at crossings and such portions of its tracks as may be commonly used as footway or crossing, which is known to the company and at which persons may be expected, (railroad company) must use ordinary care to discover their presence and to avoid inflicting injury upon them * * * .” (Emphasis ours)

Such is the rule in a majority of jurisdictions.

New Orleans and N.E. Ry. Co. v. Anderson, 293 F.2d 97 (CA 5, 1961)

Louisville & Nashville Ry. Co. v. Blevins 293 S.W.2d 246 (Ky.)

St. Louis etc. Co. v. Green, 287 P.2d 700 (Okla.)

Seaboard Air Line Ry. v. Branham, 99 So.2d 621

Jasper v. Chicago G.W. Ry., 84 N.W.2d 21 (Ia.)

Louisville & Nashville Ry. Co. v. Quisenberry, 338 S.W.2d 409 (Ky. 1960)

Both the fireman, Brothers, and the head brakeman, Ameling, in addition to Henderson testified that a dangerous condition existed at the crossing due to the carryalls crossing over before trains (R.T. 272, 299) and at least Ameling reported it to the trainmaster at Gila Bend. (R.T. 273). Brothers stated that two other train engineers had reported that the crossing by the carryalls “might cause a wreck.” (R.T. 299)

On June 17, 1966 the Arizona Court of Civil Appeals, (Div. 2) decided *Southern Pacific v. Barnes* (not yet reported) involving many similar fact and law questions.

The Court said:

“The next question raised on appeal is whether it was error for the trial court to permit the plaintiff to elicit testimony from the fireman and the head brakeman who were in the cab

of the engine on the evening of the accident that in their opinion at that time (November 3, 1963) this was a '... dangerous' (the head brakeman), '... particularly dangerous ...' and 'extra hazardous' crossing (the fireman). This testimony was elicited over the objections that it was opinion evidence, not binding upon the defendant and immaterial.

"We believe the contentions of the appellant in this regard were considered by our Supreme Court in *Alires v. Southern Pacific Company*, 93 Ariz. 97, 378 P.2d 913 (1963), and rejected. In the *Alires* decision the court was dealing with an opinion of the fireman as to the dangerousness of the crossing which was expressed, not in the trial of the action itself, but rather at an inquest. The opinion of this crew member was held to have been wrongfully excluded, the court holding that the opinion so expressed indicated a knowledge of danger which was pertinent to the issues before the court for trial. The court said:

" 'Knowledge by those in charge of the train of the particular bad character of the crossing was relevant not only to determine whether ordinary care was used, but *to determine whether defendant's conduct reached the level of wantonness*—that is, whether the train was being operated with a reckless indifference to the lives and safety of others using the crossing considering the want of special safety measures.' 93 Ariz. at 107-08.

"The fact that the opinion of the crew member is expressed in this case in the action itself, where the opposing party has opportunity to cross-examine, rather than extrajudicially, should not render such evidence inadmissible.

"We do not believe the fact that the fireman was a party defendant in the *Alires* case is critical to the determination of admissibility. The fireman was one of the employees of the defendant having some measure of control over the train at the time of the collision and his knowledge of the dangerous condition of the crossing would be imputed to his employer, *Restatement (Second)*, Agency Section 272 (1958).

"As in *Alires*, we are also concerned here with punitive damages. Since the decision of *Southern Pacific Company v. Boyce*, 26 Ariz. 162, 223 Pac. 116 (1924), it has been the law in this jurisdiction that a railroad employee who is guilty of wan-

ton or gross negligence while acting within the scope of his employment may subject his employer to punitive damages. We do not believe, therefore, that this additional grounds for admissibility of this evidence, as recognized in the above quotation from the *Alires* case, is rendered inapplicable because the employee is not joined as a party defendant." (Emphasis ours)

The Court then considered if the record supported a jury award of punitive damages of \$20,000.00 upon an award of actual damages of \$35,000.00 and concluded the evidence was adequate to permit the jury to find wanton or reckless conduct on the part of Southern Pacific.

An extensive review of the evidence would not serve any purpose.

It should be noted that in both *Barnes* and *Alires* the Court placed emphasis, in considering the propriety of a jury's award of punitive damages based on gross negligence, upon the fact the crossing involved was busy. In *Barnes* the Court said:

"Ajo Way is a heavily-traveled highway just to the south of the City of Tucson, with vehicles crossing the railroad track on the average of approximately one every ten seconds. As the train crew approached the intersection on the evening in question they could see a number of cars crossing the intersection ahead apparently unaware of the approaching train. The engineer did not attempt to reduce speed until the very instant of the collision giving rise to this action. The train crew had had near misses at this intersection on numerous previous occasions." (Emphasis ours)

In *Barnes* the Court then went on to say:

" * * The defendant's engineer estimated his speed at the time as 45 miles per hour. The crossing in question is more heavily-traveled by vehicular traffic than the crossing involved in the Alires case, which crossing the court characterized as ' . . . heavily traveled . . . ' (93 Ariz. at 101.) * * *"*

In *Alires v. Southern Pacific Company*, 93 Ariz. 97, 378 P.2d 913 (1963) the Arizona Supreme Court said:

"The foregoing brings us to a further ground of reversible error. The trial court refused plaintiff's request for an instruction

on the effect of wanton negligence as a bar to contributory negligence. Defendants again argue that the verdicts establish that the jury decided the issues on the basis of non-negligence of the defendants and that since wantonness only bars contributory negligence, the asserted error in the failure to instruct on wanton negligence is academic. In the light of our prior expressed conclusions rejecting defendants' argument an examination of the facts which might support a finding of wantonness becomes necessary.

"Thirty-fifth Avenue was within the incorporated limits of the City of Phoenix and heavily traveled, particularly around midnight when the Reynolds Aluminum Plant changed shifts. The Reynolds Plant bordered both Thirty-fifth Avenue and the Southern Pacific Company right-of-way. Its parking and outside working areas were brightly illuminated by overhead lights so that a motorist in the position of the driver observing for a train would look into the lights of the plant area. The Golden State was approximately one hour and forty minutes late at its last stop and was traveling 79 miles an hour. Other than the customary wooden crossarm near the railroad tracks, there were no signals maintained by the railroad such as an automatic wigwag to attract the attention of a driver of a motor vehicle to the possibility of an approaching train. It was a winter's night. There was, accordingly, a high degree of probability that the windows on an approaching vehicle would be up. The fireman was watching vehicular travel approaching from the south, the opposite direction to the Massey vehicle direction of travel and on the side of the engineer. At this crossing, the vehicular travel, in part, consisted of two other automobiles, one which crossed approximately one hundred feet and the other which crossed approximately fifty feet ahead of the train.

"This Court in determining whether the trial court erred in refusing to instruct on wanton negligence, must assume the truth of the evidence justifying the giving of such an instruction. *Bryan v. Southern Pacific Company*, 79 Ariz. 253, 286 P.2d 761. If the truth of the plaintiff's evidence is assumed, then it was possible for the jury to believe that there was a high degree of probability that substantial harm would inevitably result to persons in the position of the passengers in the Massey automobile. Hence, prejudicial error was committed in failing to instruct the jury on the effect of wanton-

ness as a bar to the contributory negligence of the adult passengers particularly under the circumstances of this case that defendants asserted contributory negligence in the riding with an intoxicated driver."

See also: *Bryan v. Southern Pacific Company*, 79 Ariz. 253, 286 P.2d 761 (1955) holding that making a "flying switch" of unlighted freight cars without warning signals or attendants at night in a populated area was sufficient to support a punitive damage award.

The generally accepted rule is well stated in 44 *Am. Jur.*, Sec. 484, p. 724 "*Railroads*" as follows:

"* * * An intent on the part of a railroad company to injure the plaintiff is not essential in such cases; it is enough if the conduct of the railroad's employees indicates such wantonness and recklessness as to probable consequences as implies a willingness to inflict injury or an indifference as to whether or not it is inflicted. * * *

"The general rule seems to be that wantonness or wilfulness can exist only in reference to knowledge, actual or implied, of the presence of persons on or about the tracks in a position of peril. Thus, there may be wilful or wanton misconduct prior to the discovery of the person on the tracks, where the peril or likelihood of injury is inherent in the situation, as where a train is operated at an unreasonable speed or without giving proper signals or maintaining a proper lookout at a place where the public is in the habit of using the tracks for a pathway or a crossing, and where their presence is reasonably to be anticipated. * * *

As we indicated supra, footnote, p. 8, the propriety of the action of the trial court in directing a verdict must be judged in the light of the most favorable construction reasonable men could place upon the evidence and in the light of all reasonable inferences which might be drawn therefrom favorable to Western.

Indemnity Insurance Co. of N.A. v. Atchison, Topeka & S.F. Ry. Co., 85 F.2d 438 (CCA 9, 1936)

Snead v. New York Central Ry. Co., 216 F.2d 169 (CA 4, 1954)

Lumbra v. U.S., 290 U.S. 551, 54 S.Ct. 272, 78 L.Ed. 492 (1933)

Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720 (1929)

75 C.J.S., "Railroads," Sec. 884

The United States Supreme Court in *Gunning* thus stated the rule.

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & P.R.Co. v. Cox*, 145 U.S. 593, 606, 36 L.ed. 829, 833, 12 Sup.Ct. Rep. 905; *Gardner v. Michigan C.R.Co.* 150 U.S. 349, 360, 37 L.ed. 1107, 1110, 14 Sup.Ct. Rep. 140; *Baltimore & O. R. Co. v. Groeger*, 266 U.S. 521, 524, 527, 69 L.ed. 419, 422, 423, 45 Sup.Ct. Rep. 169. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & D. R. Co. v. Powers*, 149 U.S. 43, 45, 37 L.ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369."

Certainly the District Judge, in scanning the evidence before him and in determining if a jury question was presented should apply and give heed to the same rules which he would instruct the jury should be applied by them in their deliberations.

See: "*Federal Jury Practice and Instructions.*" Mathes and Devitt. Sections 71.04 and 72.04 and cases cited. (Falsus in Uno and Inferences defined). *California Jury Instructions*, Fourth Edition, Vol. 1, No. 140 and 140.1. "Looking and Seeing." (Certainly by like reasoning to that supporting the "to look is to see rule," if a witness claims he looked at an object which was plainly visible and testifies that he saw the object do things it didn't do

and saw it was in places where it plainly wasn't, the jury may infer that, in fact, the witness did not look and is fabricating or imagining what he thinks he *should* have seen, had he looked).

Henderson admits giving no thought to the advisability of a reduction in speed to 30 miles per hour (at which speed he could have completely stopped the train in one quarter to one half mile, R.T. 410) to better control the train in the vicinity of the crossing because of the danger even though a reduction to 30 miles per hour would not delay his arrival in Yuma, as a matter of mathematical calculation, over one minute. (R.T. 325).

Furthermore, such a reduction in speed would involve no danger to the train and no operating problem. The up and down strokes on the "speed tape," (Deft's Ex. V in Evid.) indicate that the train's speed could be reduced by thirty miles, in fact, even more, to bring the train to a virtual stop and such was done throughout the run apparently with almost the ease with which a large truck could be managed on the highway.

Henderson's testimony, relating to what he saw occurring at the crossing just prior to the accident (R.T. 358, 359), and where the train actually was when he first observed the carryall, conflicts with the portions of his deposition read into evidence at the trial and his signed affidavit (R.T. 347) and is contrary to what other witnesses observed.

At the trial, he testified to first seeing the carryall proceeding north some 200 yards from the south side of the crossing (R.T. 357, 358), at which time the train was by the water tanks approximately a mile and one half east of the crossing. (R.T. 357). He testified to seeing it stop for a short time prior to moving onto the tracks. (R.T. 359). He denies seeing another carryall cross over the tracks proceeding south while the northbound carryall was stopped. (R.T. 358, 359).

Henderson also testified that when the train was three quarters of a mile from the crossing (R.T. 359, 360), he saw the carryall move onto the tracks and stop. (R.T. 359).

In his signed affidavit dated January 12, 1964, defendant's

Exhibit T in evidence, Mr. Henderson stated:

"When I first saw the carryall it was traveling on said private roadway and proceeding to cross the track from south to north. *I did not observe that the carryall stopped before entering the crossing.* (R.T. 371).

"The carryall proceeded down to the railroad tracks and stopped. I estimated that the unit of the engine was approximately one-half mile east of the private roadway when the carryall first stopped on the tracks. (R.T. 372).

"*Before I had time to apply the brakes the carryall started to move* and continued until it had cleared the track, with the exception of about two feet. (R.T. 372).

"My engine was opposite the old depot building at Picacho, *about 300 yards from the private roadway crossing when the carryall stopped the second time. I then made an emergency application of brakes.*" (R.T. 373). (Emphasis ours)

Apparently, however, in weighing the testimony of the engineer Henderson and the reasonable inferences to be drawn therefrom, the District Judge was not concerned with Henderson's contradictory versions of how the accident occurred and his conflicting statements as to when he first saw the carryall, what it did, when he applied the train brakes and what the carryall operator did.

Apparently he was not concerned with Henderson's claims that he saw the carryall operator doing things which he didn't do, saw the carryall in places where it wasn't and saw it at places at times when it wasn't there.

Certainly he must have disregarded the undisputed testimony that when the emergency brakes are applied "each and every brake on the entire train, from the head of the engine to the caboose (to) lock(s) itself as tight as it can against every brake drum on the train" with the result "many times in the wheels actually sliding," (R.T. 352, 353) and the irreconcilable conflict between the train personnel's testimony claiming early application of brakes and the cold record seen in the speed tape. We respectfully assert that a reasonable man would find it hard to draw any inference but that the train brakes were not applied at all until immediately prior to the collision (if then) since the speed recording device

shows uninterrupted speed of above 60 miles per hour from over one mile prior to the collision to the point of collision.

Certainly a jury would have been concerned, if the trial judge wasn't, with the problem as to whether or not, in fact, the accident, as a serious accident, was not caused by a combination of the engineer "big holing" the train going at a high speed at or immediately prior to the moment of impact coupled with the jolt of the impact with the end of the "stinger" and the resultant whirling of the carryall into the side of the speeding train—something which would never have occurred had the engineer been solicitous in the slightest degree for the safety of those using the private roadway crossing. Certainly the District Judge should have recognized that it was not only reasonable but probable that the jury would conclude the accident was in fact the result of the engineer's reckless or wanton indifference and that of Southern Pacific's management after learning of the dangerous condition at the crossing—to a real and existing danger that "someone will get hurt" at the crossing.

Certainly the jury would have weighed well and long, and the District Judge should have, the significance of the engineer, Henderson's, remark to the fireman, Brothers:

Q. "And as you were approaching it, we will say from Picacho on, did you have any conversation or hear Mr. Henderson say anything?"

A. "Well, as we was approaching Picacho, (2 miles east of the crossing, R.T. 158) why, I was looking ahead and Mr. Henderson said something to me, and I didn't understand, and so I got up and walked over and leaned over the cab and asked him what he said, and he said, 'I hope it stops.'"

* * * * *

Q. "Well, now, after he said 'I hope it stops,' did you say anything to him?"

A. "Yes, I asked him 'What,' and he said, 'That carryall.'

Q. "I see. And did you at that time see the carryall?"

A. "I seen the carryall then.

* * * * *

Q. "Well, at the time you had this conversation, and he said I hope it stops, or he stops, that was about half a mile?"

A. "A little over half a mile.

Q. "I see, and then you looked and saw this carryall?"

A. "Yes, sir.

Q. "And where was the carryall when you saw it?"

A. "Well, it was about 80 feet—

Q. "How far?"

A. "About 80 feet, or two car lengths from the main line.

* * * * *

Q. "And was he standing still, or was he moving?"

A. "He was moving towards—from the south he was going north toward the main line.

Q. "Would you then still say it was 80 feet from the crossing?"

A. "Well, when you are looking at it, it was approximately two car lengths, or between a car and a half or two car lengths. I said two car lengths, but it could have been closer, maybe a car length.

Q. "And how fast was it turning, was it moving?"

A. "Well, that is hard for me to say, because we was looking at it up, it was moving, but it might have been four miles an hour, it might have been six miles an hour.

Q. "And you were traveling something over 60?"

A. "We was traveling approximately 60 miles an hour.

Q. "And you were just about half a mile away?"

A. "Yes, sir.

Q. "So that if you are half a mile, it would be 30 seconds from the time you saw the carryall until you arrived at the crossing, is that right?"

A. "Yes sir." (R.T. 292, 293, 294, 295)

In sum, someone was not telling the truth. Kness said he stopped to let the loaded carryall driven by Eagar cross over ahead of him (R.T. 122, 123) and that when he pulled onto the crossing the train was at least a mile to a mile and a half away. (R.T. 127, 128). His carryall then stalled, he jumped off and with Avila's help pushed it until it stopped when it had almost cleared the crossing. Kness then went back to see if it had cleared the

tracks, found it hadn't entirely cleared the tracks and attempted unsuccessfully to again push it further but couldn't budge it since it was then fully stopped. (R.T. 166-169). The train was then so close that he abandoned the effort and retreated some distance away and turned and saw the collision. (R.T. 190). Neither Kness nor Avila could see any evidence of the train slackening speed prior to the impact—there was no screeching of brakes or sliding of wheels prior to impact. (R.T. 195).

Eagar testified to driving up to the crossing and across it while Kness was waiting in the drive out bay on the south side of the tracks (R.T. 243, 244) and to then driving the haul road with his heavily loaded carryall—a goodly distance (see Deft's Exhibit I in Evid.) up the ramp to the grade which they were building and to the far or west end of this area and there dumping and spreading his load. This had been completed and Eagar was turning around when the accident happened. (R.T. 244, 245, 246). Certainly a minute and one half would be the minimum time required for this procedure on the part of Eagar so that when Kness was waiting at the south passing bay to cross the tracks the train had to be well over one mile away coming at 60 miles per hour. Yet Brothers testified that they first saw the Kness carryall when it was about 80 feet—maybe 60 feet away from the crossing, traveling at about 4-6 miles per hour after which while the train travelled one half mile—30 seconds—the carryall drove up to the crossing and stopped—started up—pulled onto the crossing—stopped—was pushed, probably 30 feet (R.T. 166, 167)—stopped—Kness went to its rear and saw it was foul of the south track (R.T. 168)—tried to push again—then with the train some hundreds of feet away—at the small bridge to the east he retired some distance away and saw the carryall literally spun around in the air by the velocity of the train on impact. (R.T. 195, 196, 197, 198).

We respectfully assert that with the foregoing testimony before any jury, the conclusion which would be unequivocally drawn by the jury would be that Henderson was paying absolutely no at-

tention to what was ahead of the train approaching or on the crossing and that his testimony constituted an attempt on his part to reconstruct the accident in a light most favorable to him. If anything would supply the clincher to this conclusion, it would be his testimony that at three fourths of a mile from the accident scene he "set the air, I started to stop." (R.T. 390). He further testified:

Q. "And what did he do after he pulled up on the track and stopped?

A. "He evidently killed his motor.

Q. "I didn't ask you that. I asked you, what did he do, what did you see him do?

A. "I saw him working, or working the controls.

Q. "You saw him like he was trying to start it, did you?

A. "That is right.

Q. "How long would you say he stopped there, Mr. Henderson?

A. "I don't know. Very shortly.

Q. "Long enough that you saw him apparently doing something toward starting the motor?

A. "Yes, sir.

Q. "Then it started up and went further?

A. "Yes, sir.

Q. "And in this period of time when it was sitting there, were you doing anything toward stopping the train?

A. "Yes, sir.

Q. "What were you doing?

A. "Setting the air.

Q. "How much. Trying to stop it as hard as you could?

A. "No, sir, I didn't go to emergency.

Q. "But short of emergency?

A. "Yes, sir.

Q. "Then what happened?

A. "He started up again.

Q. "Then what happened?

A. "He stopped again.

Q. "Where did he stop?

- A. "Just north of the track about—and I thought he was clear.
- Q. "You thought he was clear?
- A. "I thought he was probably clear, yes.
- Q. "Have you thought so at all times since the accident, that you thought he was clear at that time, Mr. Henderson?
- A. "I didn't know until I was right on top of him, where I could see.
- Q. "I beg your pardon, sir. Did you prior to today ever make this statement to anyone, that you thought he was in the clear at that time?
- A. "No, sir, I didn't know. But I thought that maybe he could be.
- Q. "In any event, what did you do after he stopped the second time?
- A. "I went to emergency.
- Q. "Even though you thought he was clear.
- A. "Yes, sir, because I had already gone to emergency when he stopped the second time.
- Q. "So you thought he was in the clear, but you left your train grinding its wheels on the track to stop, did you.
- A. "Yes, sir.
- Q. "And you didn't stop?
- A. "No, sir." (R.T. 361, 362, 363)

Henderson, therefore, contrary to the fact testified he saw Kness doing things after the carryall came on the tracks which Kness and Avila plainly testified Kness did not do and which the other trainmen also said did not happen (at least they were looking and said they didn't see it). (T.R. 270, 271, 295, 296). Henderson in addition to giving widely varying versions as to the course of the carryall in coming onto the track as hereinbefore outlined, claimed he saw it first stop (after coming on the track) and saw Kness trying to start it and in fact getting it started and saw the carryall move forward and again stop and that when the train was only 300-500 feet away Kness for the first time got out of the driver's seat and left the area of the carryall. (R.T. 359, 365).

Kness in fact had jumped off the carryall before it came to a

full stop (R.T. 128, 166) on the crossing and when the train was over one mile away (R.T. 194, 127, 128) yelled to Avila to help him (R.T. 166, 182), pushed on the rear wheel and he and Avila pushed the carryall and kept it moving. (R.T. 128, 166). The carryall never did come to a full stop on the crossing the first time and if it had Kness and Avila could not have moved it. (R.T. 168, 190). Kness didn't try to restart the diesel, for it was started by a separate gasoline engine which would take about one minute to start. (R.T. 120, 121).

It is respectfully submitted the trial judge wholly failed to comprehend and give effect to the applicable rules governing the function of the trial court trying a case to a jury on a motion for a directed verdict and the responsibility of the trial court to respect the function of the jury, particularly in a federal court under the constitutional guaranties of the Seventh Amendment to the Constitution of the United States.

The losses sustained by Southern Pacific were not legally caused by and did not legally arise out of the presence, maintenance or use of the private roadway

The critical phrase in Paragraph 6 of the Roadway Agreement is found in the last three lines of Paragraph 6. The injury must be one "caused by or arising out of the presence, maintenance, use or removal of said roadway."

Unless we are to reverse the rule universally applied in the construction of undertakings of a noncompensated surety, viz., that the language of the indemnity agreement is construed strictly in favor of the indemnitor and indemnity is to be denied unless clearly required by the letter of the indemnity agreement (See also: *Employers Casualty Co. v. Foley*, 158 F.2d 363 (CCA 5); 143 A.L.R. 312, p. 315 et seq.) it must be concluded that the intent of this phrase is that the harm must be "legally caused by" and "legally arising out of" the presence, etc. of the roadway.

That this is so is buttressed by the fact Southern Pacific, by a separate unrelated contract provision of the Private Roadway Agreement required of Western the agreement "Licensee (West-

ern) shall not obstruct, or interfere with, the passage of Railroad's trains" (Par. 3) and originally declared in Count Three of its Complaint for breach of this undertaking. However, Southern Pacific elected to prosecute only its claim under Paragraph 6 for indemnity and Count Three was dismissed.

Count One, in negligence, was also dismissed. No claim is made that Western could have foreseen or prevented this accident; no claim is made that any act or omission of Western's brought about this unhappy occurrence. The sole, proximate cause of the accident was the reckless indifference of Henderson to what lay ahead of the juggernaut which was hurtling down the track under his hand but without control by him or concern on his part for the probable consequences should someone be on the track ahead.

Unless it be found that the accident was legally caused by or arose out of the presence and use of the roadway further inquiry as to the cause of the accident serves no purpose since Western is here charged with losses legally springing from that source.

A brief resume of the background of Paragraph 6 and of principles applicable to this problem may be of service. If not the pages will turn quickly.

The Private Roadway Agreement containing the indemnity agreement was required of Western by the Bid Proposal issued by the Arizona Highway Department (Deft's Ex. R in Evid.) for construction of the section of Interstate No. 10 here involved.

"The Southern Pacific Company will require that the contractor enter into an agreement with the Company covering the crossing.

* * * * *

"Please attach this memo securely to your proposal and be guided accordingly."

The instrument was prepared by Southern Pacific and mailed to Western for execution and executed by Western as received. (R.T. 101, 102).

The agreement was not a negotiated agreement but was pre-

pared by Southern Pacific and sent to Western for execution. Therefore on this score also it is to be construed against Southern Pacific and any ambiguities therein resolved against Southern Pacific.

Alcoa S.S. Co. v. U.S., 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225
Kingman Water Co. v. U.S., 253 F.2d 588 (C.A. Ariz.)

J. C. Millett Co. v. Distillers Distributing Corp., 258 F.2d 139 (C.A. Cal.)

Reiss v. Murchison, 329 F.2d 635 (C.A. Cal.)

Prudential Ins. Co. v. Goodman, (Pa.) 152 A.2d 664.

Since Plf's Ex. 4 in Evid. is a form agreement insofar as Paragraph 6 is involved, plainly prepared for multiple use, we may assume that Southern Pacific had exercised care in its preparation and that the words employed to express the engagements of the parties thereto were employed deliberately and with the intent of thereby stating and limiting the obligations assumed and due under it (from Western).

John J. Davis Co. v. Shepard Co., 47 A.2d 635 (R.I.)

Commonwealth v. Henry W. Horst Co., 72 A.2d 131 (Pa.)

In *County of Alameda v. So. Pac. Co.*, 360 P.2d 327, 333 the Supreme Court of California said:

"Finally Southern Pacific prepared the contract, and it is thus to be strictly construed against it. Civil Code, § 1654; *Weil v. California Bank*, 219 Cal. 538, 541, 27 P.2d 904; *Payne v. Neuval*, 155 Cal. 46, 50, 99 P.476. *It is reasonable to conclude that Southern Pacific, having carefully provided in express terms for indemnity for its own negligence in two particulars, would have likewise made express provision for indemnity against liability based on its negligent failure to maintain the spur track in proper condition if it had intended to bind Rock to such an obligation.*" (Emphasis ours)

In like fashion we can say that if Southern Pacific here intended to bind Western to indemnify it for damage only remotely flowing from the presence and use of the crossing, which damage flowed proximately from its operation of its trains in a negligent manner, it should have said so.

The principle also is applicable that a contract will be given

a reasonable, fair interpretation. Any construction which would produce an unfair, unusual or improbable result will be avoided, if possible. Thus a construction which would make Western responsible for the operation of the railroad, over which it had neither supervision and control nor the right to supervision and control, as distinguished from the management, installation and use of the roadway and related structures involving responsibilities of railroad employees (over which it had the opportunity to supervise and observe the activities of the railroad employees) is unreasonable and not to be accepted unless clearly required by the plain and unambiguous terms of the agreement.

Continental Bus System, Inc. v. N.L.R.B., 325 F.2d 267 (C.A. Colo.)

Texaco, Inc. v. Holsinger, 336 F.2d 230 (Cert.den. 379 U.S. 970) (C.A. Kan.)

National Sur. Corp. v. Western Fire & Indemnity Co., 318 F.2d 379 (C.A. Tex.)

Osborn v. Boeing Airplane Co., 309 F.2d 99 (C.A. Wash.)

Since we are dealing with a contract of indemnity the particular limitations applicable to such contracts become important.

In *Employers Casualty Co. v. Howard P. Foley Co.*, 158 F.2d 363 (CCA 5) the rule is stated:

"* * * On the other hand it is certainly the general rule that, where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor. The cases regarding such provisions in a subcontractor's agreement with the main contractor are reviewed in the recent note to *Walters v. Rao Elec. Equip. Co.*, 143 A.L.R. 312, and especially *Par. III*, page 315 and ff. They are all found to deny a liberal construction in favor of the contractor."

To the same effect:

Halliburton Oil Well Cementing Co. v. Paulk (CA 5) 180

F.2d 79, wherein the Court said:

"This is particularly true where the result would be to indemnify against one's own negligence and it will not be so construed *unless such obligation is expressed in unequivocal terms.*" (Emphasis ours)

Southern Bell Tel. & Tel. Co. v. Mayor (CCA 5), 74 F.2d 983

Williston on Contracts (Revised Ed.) Vol. 6, Sec. 1825, n. 8

DeTienne v. V. S. Nielson Co., (Ill.) 195 N.E. 2d 240

Westinghouse Elec. Co. v LaSalle Corp., 70 N.E.2d 604

Brown v. Moore, 247 F.2d 711 (CA 3)

Smith v. Ohio Oil Company, 356 S.W. 2d 443

Turner Const. Co. v. W. J. Halloran etc. Co., 240 F.2d 441 (CA 1)

The oft quoted case of *Perry v. Payne* (Pa.) 66 Atl. 553, 11 L.R.A. N.S. 1173 teaches:

"It is contrary to experience and against reason that the contractors should agree to indemnify Perry (owner) against the negligence of himself or his employees. It would make them insurers, and impose a liability upon the contractors, the extent of which would be uncertain and indefinite, and entirely in the hands of Perry. * * * A single act of negligence on the part of the owner or his employees, *over whom the contractors would have no restraint or control whatever*, might create a liability which a lifetime of successful business could not repay." (Emphasis ours)

In *Boise Cascade Corp. v. Nicholson Mfg. Co.*, 221 F. Supp. 135, Judge Solomon said:

"* * * The court found that the loss had been caused by the *sole negligence* of the railroad and denied recovery, relying on the 'firmly established rule that contracts of indemnity will not be construed to cover losses to the indemnitee caused by his own *sole negligence* unless such intention is expressed in clear and unequivocal terms.' *Southern Pacific Co. v. Layman*, 173 Or. at 279, 145 P.2d at 296.

"In marshalling the reasons behind this rule of construction, the court pointed out that when a general indemnification clause may operate without including the negligence of the indemnitee, it will not be presumed that it was intended to include it.

"The liability of such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it.' Southern Pacific Co. v. Layman, 173 Or. at 279, 145 P.2d at 296, quoting Perry v. Payne, 217 Pa. 252, 262, 66 A. 553, 557, 11 L.R.A., N.S., 1173 (1907)." (Emphasis ours)

This accident was not caused by the use of the roadway (even as the sole *remote* cause); it was legally caused by the sole negligence of Southern Pacific. At the very outset of Paragraph 6, Southern Pacific limits the hazard under contract consideration to the hazard to the operations of Southern Pacific *by reason of the construction, maintenance and use of the roadway*. There is no hint here that any hazard is to arise from any improper or careless operation of the railroad. The *sole hazard contemplated* is that arising from the roadway and its use. At this point, if Southern Pacific had desired to fairly apprise Western that it was, in effect, signing a blank check, guaranteeing the efficient and careful operation of the railroad over which Western had no possible control or even forewarning of careless operation of the trains on the road, it should have said so.

Thereafter the agreement spells out joint obligations and undertakings by both Southern Pacific and Western as to the installation, maintenance and use of said crossing. Each party, in respect to these undertakings, might be found negligent. Since these were all local undertakings subject to scrutiny and complaint by Western if not properly done, particularly since Western was a day by day observer in these matters, it is understandable that Southern Pacific would put upon Western the burden of supervision and care as to these local installations and functions and that Western would agree to that responsibility.

With these considerations in mind the language of Paragraph 6 becomes clear and reasonable.

The language of Paragraph 6 does *not* say caused by or arising,

in whole or in part by the roadway; *it must be caused by the roadway*, not by the roadway as a remote cause and the active negligence of Southern Pacific's employees as the proximate cause.

Southern Pacific, a common carrier, is the author of the agreement here involved so we may assume that the use of the phrase "caused by" was employed by it with the meaning ascribed to it in common carrier cases considering this phrase. Cf. Title 49, Sec. 20 (11) U.S.C.A.

In a very early case, oft cited, *Morrison v. Davis*, 20 Pa.St. 171, the defendant carrier used a lame horse in hauling a boat in a canal, resulting in a delay of the boat. Because of this delay the boat did not make progress as it should and was struck by a flood which it would have avoided had a sound horse been employed. The Court held that the use of the defective (?) horse was a remote cause of the injury and the carrier was not therefore the cause of the loss. (Here a "lame" engine delayed the normal progress of the carryall).

In *Memphis Ry. Co. v. Reeves*, 10 Wall. 176, 192, 19 L.Ed. 909, the defendant carrier contracted to start with a load of tobacco the evening before it did move the tobacco, as a result of which breach the shipment was caught in a flood. The Supreme Court, citing *Morrison*, held the breach only a remote cause and hence the carrier was not liable.

A case approaching controlling force in this fact situation, *Standard Oil Co. v. Payne*, 190 N.W. 769, was decided by the Supreme Court of Michigan in 1922. The facts are as follows:

Standard Oil Company owned a petroleum distribution center abutting the railway tracks. The railroad constructed a side track alongside this petroleum plant under an agreement containing an indemnity clause in favor of the railroad as indemnitee in which the Court summarized for purposes of its opinion as follows:

"Under this contract the defendant is exempt from liability for —

" 'loss or damage by fire upon premises owned or occupied by

second party (plaintiff) arising from the operation of said track for benefit of second party."

The Court also summarized counsel's contentions as follows:

"Plaintiff insists that —

" 'A reasonable construction of this clause of this contract means this, that the loss and damages must arise from some act that was being performed for the benefit of the plaintiff at the time, and that this act must be the cause of the fire and damage.' "

"Defendant's counsel say:

" 'These words mean "having as a cause, without which the result would not have been produced, the operation of the side track." ' ' "

On the day of the accident the railroad delivered on this siding five cars of gasoline. A box car which was sitting on the siding was shunted out onto the main track as a part of the delivery operation. After the box car had been switched by the engine and tanker cars to the main track, the tankers were then pushed through an open switch onto the siding and the switch was left open while the crew were engaged in spotting these five tankers on the siding. While so engaged the switch crew heard a train on the main track approaching. The box car was in plain view and the engineer on the switch engine attempted to attract the attention of the engineer of the approaching train by sharp blasts on the whistle but in vain. The train came on with unabated speed, crashed into the siding through the open switch and into the tankers, setting them afire.

Standard Oil sued for its damages and was met, as here with the defense of the indemnity agreement.

The Court said:

"* * * Along came the freight train on the main track. It had no occasion to enter the siding. It did so enter, not for the purpose of using it for the benefit of plaintiff or for any purpose in the furtherance of the business of either plaintiff or defendant, but because of the negligence of its engineer in failing to observe that the switch was open, notwithstanding the switch signal and the presence of the box car in plain view

on the main track. That his action in doing so was clearly negligent is not denied. His train collided with and wrecked the switching train. This negligent conduct of the engineer was therefore the proximate cause of the damage plaintiff sustained on account of the fire. Defendant's counsel so concede in their reply brief:

"The loss was due, it is true, to the negligence of the defendant's engineer on the freight train, but, except for the use of the side track for the benefit of the plaintiff at the time, his act would not have caused the fire."

"Had there been no contract, the liability of the defendant would have been clearly established. Plaintiff's counsel urge that the exemption from liability provided for in the contract does not relieve unless it appears that the use of the side track for plaintiff's benefit *was the proximate cause* of the loss." (Emphasis ours)

The Court then considered the rule requiring that the carrier must be either the proximate cause of a loss or a concurring proximate cause of a loss before it can be held liable where an act of God or other exception to its common carrier liability is involved. The Court then said:

"* * * An ordinary contract of carriage exempts from liability for loss arising from or happening by reason of an act of God. If a carrier may only have the benefit of this defense when it appears that the 'Act of God' is the proximate cause of the loss, must it not also appear when the contractual provision is relied on as a defense that the act of the switching crew in leaving the switch open, an act arising from 'the operation of the track' for plaintiff's benefit, was the proximate cause of plaintiff's loss? We feel constrained to so hold. While the loss would not have occurred had not the switch been left open, the loss in the cases cited to sustain the rule would not have occurred without the happening of the untoward event, spoken of as the 'act of God.' In this case, as in those, the act relied on as a defense would not have caused a loss but for the intervention of a new agency, unrelated to that relied on for exemption, and which in itself was the proximate cause of the loss."

See also *Kirby v. Oregon Short Line Ry. Co.*, 197 P. 254 (Mont.) *Fort Worth etc. Ry. Co. v. Lemons*, 258 S.W. 1095

(Tex.); *Standard Pickle Co. v. Pere Marquette Ry.*, 193 N.W. 300; *Rotundo v. Erie Ry. Co.*, 198 N.Y.S. 688; *Hadba v. Baltimore & Ohio Ry.*, 170 N.Y.S. 769.

The question then is: Can it be said, viewing the facts fairly and objectively, that the collision was caused, in contemplation of law, by the carryall, sitting there helplessly but only in a position of peril to its driver and to the railroad if the railroad, acting in relationship to a matter wholly under its control and, in fact, unrelated to the private roadway, acted in disregard for its well defined obligation to those who it well knew might cross its path?

The Court Erred in Placing the Burden of Proof on Western

In effect, the District Judge held that the fact of a collision between the carryall of Western and a Southern Pacific train at the crossing in question raised a presumption that the collision and resulting damage was legally caused by and arose out of the presence and use of the crossing and within the meaning of the indemnity clause of the Private Roadway Agreement. In this the District Judge erred.

1. Western *admitted* no more than that a collision occurred between its carryall and a Southern Pacific train at or on the private crossing of the railroad tracks, the use of which was governed by Plf's Ex. 4 in Evid. Western to this extent—and *only as to these facts*—waived a trial by jury by its admission.

Southern Pacific was an actor as well as Western in causing the accident. It does not follow inescapably and as a matter of law that because a carryall was on the crossing and a train ran into it that this accident was legally caused by or arose out of the presence or use of the roadway; it does not follow as a matter of law that the conduct of the engineer Henderson and the railroad itself, amounted to no more than simple negligence. Western was entitled to have the jury draw its own inferences from the facts surrounding the accident as exposed upon a trial of the vital issue of causation.

This Court, in *Guerrero v. American-Hawaiian Steamship Company*, 222 F.2d 238 (1955) dealt with the usurpation of the prerogatives of a jury, when a trial by jury has been demanded, in a case somewhat akin to this, as follows:

"* * * Neither the motion for a summary judgment, nor anything the court said, remotely indicate that the seaman ever *admitted* in his testimony that the release was valid. Appellee, it is clear, was under the impression that every essential to the validity of the release was proved and this was the court's view. But there is no contention that appellant seaman admitted that the evidence established such alleged fact. Here, unquestionably, was a question of fact which, under the Seventh Amendment, could be resolved only by a jury from the evidence in the case.

"As was said in *Slocum v. New York Life Ins. Co.*, 1913, 228 U.S. 364, 386-387, 33 S.Ct. 523, 532, 57 L.Ed. 879:

"'But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the *effect of the evidence*, finds the facts involved in the issue and renders judgment thereon.'

"The situation just alluded to by the *Slocum* case was where a verdict had been reached but the judgment had been set aside. In referring to a demurrer to the evidence in the same case, the court said, 228 U.S. at pages 388-389, 33 S.Ct. at page 533:

"'* * * and the admission (of facts on demurrer) * * * must be of the facts, and not merely the evidence from which their existence is inferable.'

"So inclusive is the rule (that the facts must be found by a verdict of the jury) that even in cases tried to a jury and verdict rendered, the right of the court to order a judgment upon the ground that the plaintiff has made no case, is extremely limited. * * *" (Emphasis the Court's)

Whether or not the presence or use of the private roadway legally caused or gave rise to the accident and resultant damage is just as truly a fact to be found by the jury as was the fact of the validity of the release in *Guerrero*.

The language of Paragraph 6 does not meet the requirements of certainty and of "crystal clear" language necessary to imposing liability upon Western as a non-compensated surety and hence the District Judge erred in imposing liability upon Western as a matter of law

Appellant does not assert that Paragraph 6 was purposefully designed as a trap for the unwary; appellant does assert it was, as written, in fact, such a trap.

Since the agreement was one which appellant was in reality forced to sign—either that or withdraw from the bidding—common fairness would have indicated that the true hazard which Southern Pacific now claims Western assumed, should have been reasonably clearly stated. The contrary is the fact.

At the threshold of a consideration of the meaning and purpose of Paragraph 6 the understanding of the reader is directed to, first the cause of the hazard, the subject of the contractual indemnity, which is stated to be one arising "by reason of the construction, maintenance and use" of the private roadway.

Next the reader is told that this hazard is to "the operations of Railroad." What operations? The expected, normal, lawful and careful operations, for since the facet of the Railroad's involvement in the crossing use is here directly under contractual consideration in fairness and for clarity and precision of expression, if operation of the railroad other than normal operation is contemplated, this is the place to say so. If Railroad contemplated that Western should knowingly assume responsibility for *its sole negligence*, if such an obligation was to appear "crystal clear" and "beyond peradventure of a doubt" here was the place for the caveat.

There is no hint, even, of this. The hazard here pointed to arises only from one source, the construction and use of the roadway. True, it is to the operations of Railroad but it is to the usual, normal and careful railroad operations which are pointed to by the Railroad as the source which should be of concern to the indemnitor.

The reader is then led through a confusing mumbojumbo of words to find that the loss governed must be one "caused by or arising out of the presence, maintenance, use or removal of said roadway."

Then follows, almost as an afterthought and as of really no great significance, the real "hooker"—the seemingly innocuous "tail to the kite" as deadly as the tip of the scorpion's tail—"regardless of any negligence or alleged negligence on the part of any employee of Railroad."

What language of the paragraph does this "regardless" clause modify? To what does it refer back? Certainly not "operations of Railroad" for that is not the verb of the sentence. After harkening back to principles of grammar long since forgotten but refreshed by "A Writer's Manual and Workbook" (Paul Kies, F. S. Crofts & Co. (N.Y.)) Chapter 13, p. 79 et seq., we conclude that the phrase "regardless of the negligence etc." is what Mr. Kies would term a "squinting modifier"—as such it is unclear whether it modifies the "save harmless" language or "arising out of or caused by" language of Paragraph 6.

If the save harmless (etc.) language of the agreement modifies negligence (but not sole negligence?) of Railroad then Western is liable (barring wanton or perhaps sole negligence of Railroad). But if it modifies the second clause "caused by or arising out of" then it is inapplicable to the negligence of Railroad in the operation of its train and the District Judge erred in denying Western's Motion for Summary Judgment based upon its contention that the indemnity clause did not cover the loss in question and in directing a verdict against Western.

The mishmash of words which make up this one sentence of Paragraph 6 is demonstrated if we parse the sentence.

- a. *Licensee* is the subject;
- b. *does release and agree* is the compound verb;
- c. *to indemnify and save* is a compound infinitive object of the verb;

- d. *Railroad {x} harmless* is an infinitive phrase object of the infinitive *to indemnify*;
- e. *and save harmless* is the predicate adjective of the understood infinitive *to be*;
- f. *hereby* is an adverb modifying the verb;
- g. *in consideration of the exposure to hazard of the operations of Railroad*, are four escalated prepositional phrases the total of which modify the verb;
- h. *by reason of construction, maintenance, or use of said roadway* are escalated prepositional phrases modifying *exposure*;
- i. *from and against liability, claims, costs, and expenses for loss or damage to property of either party hereto or of third persons* are escalated and compounded prepositional phrases modifying *harmless*;
- j. *and for injuries to or deaths of Licensee, agents, employees, or invitees of Railroad* comprise the final escalated part of the compounded prepositional phrase, two-thirds of which had already been completed before beginning the third and last part, the sum total of which modifies *harmless*;
- k. *caused by or arising out of presence, maintenance, use, or removal of said roadway* are participial phrases modifying the objects of the compounded prepositional phrases mentioned above;
- l. *regardless of any negligence or alleged negligence on the part of any employee of Railroad* is another escalated set of prepositional phrases claimed by Railroad to go back to the beginning and modify *harmless*. This is by no means clear.

This indefiniteness with respect to what the last set of prepositional phrases modifies renders the paragraph most ambiguous. Due to the mixed up grammatical structure of Paragraph 6 it is just as reasonable to conclude that the negligence on the part of the Railroad which is the subject of the indemnity is negligence *in connection with its obligations related to the use, con-*

struction, maintenance and removal of the crossing as to contend that it relates back to the beginning of the sentence and embraces all of the entire paragraph which precedes the final clause of the sentence.

If we diagram the sentence the confusion engendered by this "futuristic" use of language becomes more apparent. (See Ex. 2, Addendum). In this diagram the phrase "regardless of etc." is of necessity left suspended because it is unclear what it modifies.

Appellant contends that properly construed, the indemnity agreement, Paragraph 6, indemnifies the Railroad only against the negligence of Railroad employees in the discharge of its duties as to the *construction, maintenance and use of the private roadway resulting in property damage to either the Railroad, appellant or third persons or in injury or death to the agents, employees and invitees of Licensee-appellant and Railroad*, such negligence being occasioned, caused by or arising out of the *presence, maintenance, use or removal of said roadway*.

It does not, as appellee contends, refer to the sole negligence of Railroad and its employees in the running of its trains, something entirely beyond the control and foreseeability of Western.

Even if it be concluded that it is equally clear that the "regardless" clause may modify "save harmless" nonetheless the District Judge erred in directing a verdict since the Railroad had not demonstrated by crystal clear language that the indemnity embraced losses proximately caused by its sole or contributory negligence. The best way to characterize this type of prolix and verbose language exemplified by Paragraph 6 is "legal tangle-foot."

CONCLUSION

We respectfully submit, for all the foregoing reasons the judgment of the District Court should be reversed with instructions (a) To dismiss Count Two as not supporting a claim for indemnity against a non-compensated surety or, in any any event

(b) to grant appellant a new trial both as to the complaint of appellee and as to the counterclaim of appellant.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

Appendix

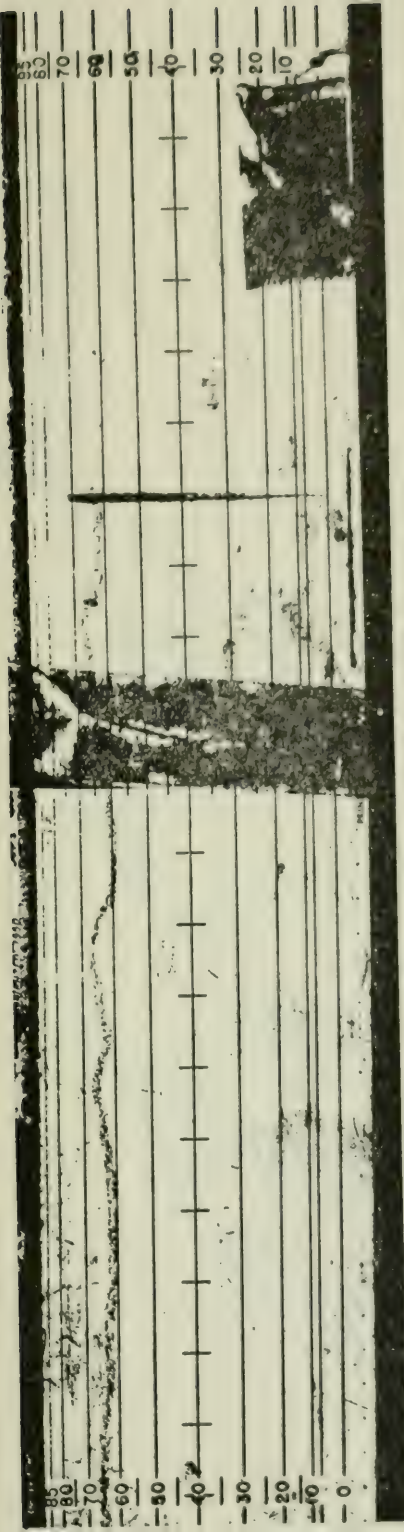


Exhibit 1



Exhibit 2

No. 20939

In the

United States Court of Appeals

For the Ninth Circuit

WESTERN CONSTRUCTORS, INC., a corporation,
Counterclaimant-Appellant,
vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC., a corporation,
Defendant-Appellant,
vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff-Appellee.

**Brief of Counterdefendant-Appellee and
Plaintiff-Appellee Southern Pacific Company**

Appeal from the United States District Court for the District of Arizona

FILED

AUG 17 1966

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WM. B. LUCK, CLERK

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**Brief of Counterdefendant-Appellee and
Plaintiff-Appellee Southern Pacific Company**

Appeal from the United States District Court for the District of Arizona

STATEMENT OF THE CASE

In 1963 the Arizona Highway Department of the State of Arizona was engaged in construction work upon a highway in close proximity to and generally paralleling the main line of Appellee's railroad. Contractors proposing to bid upon the work were advised by the State that a private railroad crossing would be made available to contractors so that earth could be moved from the opposite side of the railroad right-of-way to the construction site, since this was to be

the source of earth necessary to build up the grade of the highway. The State further advised contractors that the railroad company's formal approval of such a crossing was anticipated but that the railroad company would require that the contractor enter into an agreement with the company covering the crossing. (R.T. 91-105) As a matter of interest but not of material importance, the area where the earth was to be taken from could be physically reached by means other than crossing the railroad tracks, namely, by using a railroad overpass adjacent to the area. (Ex. 5)

Appellant, Western Constructors, Inc., was the successful bidder for this project and it executed the Private Roadway Agreement over which this lawsuit arose. (Ex. 4) The Agreement contains this provision: "In consideration of the exposure to hazard of the operations of railroad by reason of the construction, maintenance and use of said roadway, licensee does hereby release and agree to indemnify and save railroad harmless from and against all liability, claims, costs and expenses for loss of or damage to property of either party hereto or of third persons, and for injuries to or deaths of licensee or the agents, employees or invitees of licensee or third persons or the employees of railroad caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of railroad."

Other pertinent provisions of said Private Roadway Agreement are:

Clause 3. All vehicles shall come to a complete stop before crossing the tracks at the above location, and shall not proceed across said tracks until it has been ascertained that it is safe to do so. Licensee shall not obstruct, or interfere with, the passage of railroad's trains.

Clause 11. Licensee, at licensee's expense, shall provide a competent flagman satisfactory to railroad for the control of vehicular traffic while said roadway is being used by licensee.

Clause 13. Railroad, for and on behalf of licensee, shall provide the necessary labor and materials for and shall: (a) install a signal indicator, together with the necessary appurtenances, in the approximate location indicated on said print; said indicator being required as an adequate warning device for licensee's flagman at said roadway of approaching railroad trains.

Pursuant to the Agreement the railroad crossing in question was provided, together with a flagman for the control of vehicular traffic employed by Western, and together with a signal indicator at the crossing to indicate when and from what direction a train was approaching. In addition to these safeguards there was another mechanical safety device installed at the crossing. This was a switch which would activate the railroad block signal located half a mile east of this crossing. By activating this signal any train approaching from the east could be warned to stop. (R.T. 138-141, 152)

This was the indemnity Agreement exacted by the railroad in consideration of the hazard created by the existence and use of the crossing, and these were the precautions taken by the railroad to guard against accidents.

This was the railroad's main line and numerous trains used it each day at all hours. Its trains customarily operated in this area at 65 miles per hour. (R.T. 137, 138) The train involved in the collision that is the subject of this lawsuit was traveling about 63 miles per hour as it approached the crossing. (R.T. 337)

On one or more occasions prior to the accident the railroad engineer had observed Western's vehicles crossing too close (he deemed) in front of his train as he was approaching, and he reported his concern to his superiors. (R.T. 329-335) The railroad, in turn, complained to Western that its drivers were not stopping their vehicles at the crossing. (R.T. 414, 415)

On October 24, 1963 a collision occurred at said crossing between a westbound 80-car freight train and one of Western's carryalls driven by Harold Kness which had stalled afoul of the crossing. The collision resulted in derailment of the train and monumental damages. The facts immediately surrounding the collision, taking the evidence most favorable to Western where there was any conflict therein, are as follows:

Avila was Western's flagman at the crossing; it was his job to watch for trains. (R.T. 202-239) It was his job to watch the mechanical indicator which would indicate when and from what direction a train was approaching. (R.T. 205, 206, 222) It was his job to throw the switch that controlled the railroad block signals half a mile away, to stop a train if necessary. (R.T. 224, 225) It was his job to control Western's vehicles at the crossing. (R.T. 221-224) Avila saw the train coming from the east when it was over a mile and a half away, at which time he gave Kness permission to negotiate the crossing. (R.T. 206, 212, 124) Kness proceeded to do so and as his carryall came up onto the tracks the engine quit. (R.T. 125, 126) At this point the train was a mile to a mile and a half away. (R.T. 127, 128) Kness threw the engine into neutral gear, pumped the accelerator to try to keep it alive but it failed and he jumped off to try to push it on over the tracks, yelling to Avila to help him. (R.T. 128, 166, 167) When Avila saw the carryall

stalling, his first impulse was to throw the block signal switch but instead he responded to Kness' call for help. (R.T. 214) The carryall continued to roll until it was almost clear of the crossing. (R.T. 167) At or about the time it stopped rolling, both Kness and Avila looked up and noticed that one of the headlights of the train was red. (R.T. 186-189, 234) At this point the train was near the block signal half a mile away. (R.T. 169, 218) Avila and Kness abandoned their futile efforts to push the carryall clear of the crossing and fled for their own safety. The significance of the red headlight on the train is this: Under ordinary conditions the headlight is white but when the train brakes are put in emergency this light turns red automatically. (R.T. 405, 406) Other than applying the brakes there was nothing more that the train operators could do except blow the whistle and ring the bell, which they were doing. (R.T. 265, 267, 336) To the operator of the train the carryall first appeared to stall on the tracks, then start up again and stall a second time, almost in the clear. When it first came upon the tracks and appeared to stall, the engineer made a service application of the train brakes, then when the carryall stopped finally the engineer placed the train in full emergency. (R.T. 322-412) The distances at which these events occurred may be in some conflict insofar as the testimony of the engineer is concerned, inasmuch as he corrected his original estimates. These were based upon how far away he thought certain landmarks were from the crossing. Later, upon actual measurement of the distance from the crossing to the landmarks, he corrected his estimates.

His estimates of the distances involved are compared as follows:

A. By Deposition or Affidavit

- (1) First saw the carryall approaching the crossing when the train was approximately one-half mile away. (R.T. 381)
- (2) When the train was approximately half a mile or 600 or 700 yards away the carryall appeared to stop on the crossing. (R.T. 372, 385, 388)
- (3) The carryall stopped finally and the train was placed in emergency when opposite the old depot building 300 yards away. (R.T. 373, 408)

B. Trial Testimony

First saw the carryall approaching crossing when train was opposite water tanks (R.T. 357), which prove to be one and a half miles away. (R.T. 347, 348)

When the train was about three-fourths of a mile away the carryall appeared to stop on the crossing. (R.T. 359)

Upon actual measurement the old depot building is one-half mile away. (R.T. 409, 374, 375)

The testimony of the two other train crewmen, Brothers, the fireman, and Ameling, the head brakeman, was that the train was placed in emergency half a mile to three-quarters of a mile away. (R.T. 276, 277, 303) All of the evidence showed that it would have taken a mile to a mile and a half to stop this train in emergency. (R.T. 286, 304, 408) After the train was placed in emergency all three train crewmen hit the deck for their own safety in view of the impending collision. All four engines and many of the cars behind them derailed. The highway overpass structure loomed directly ahead beyond the crossing but fortunately the engines needled their way through the aperture. The cars behind them were not so fortunate and stacked up against the overpass. Fortunately this was a freight train.

The speed tape recording (Ex. V), to which Appellant's brief refers, is only evidence that at the moment of impact

the train's speed had only reduced to about 60 miles per hour. It does not raise the inference suggested by Appellant that the brakes weren't applied until at or just immediately before the collision. The significance of the red headlight seen by Avila and Kness (Western's own employees and witnesses) when the train was half a mile away proves that the brakes were on then and prohibits any such inference. It must be remembered that this was an 80-car freight train, loaded with merchandise, powered by four locomotives, going 63 miles per hour, and that it takes up to a mile and a half to stop such a train. Under the circumstances the only permissible inference raised by the speed tape is that during approximately the first half mile of brake application the train's inertia was not yet overcome and its speed not much affected.

The trial court directed a verdict in favor of Appellee and entered judgment establishing Appellant's liability under the indemnity agreement of the parties for damages sustained by Appellee. The basis for the court's judgment was that the indemnity Agreement applied and that there was insufficient evidence of wanton negligence to support Appellant's defense.

Appellant raises two questions basically:

(A) Appellant claims there was sufficient evidence of wanton negligence on the part of Appellee to go to the jury for determination.

(B) The indemnity Agreement is equivocal and ambiguous, and properly construed, did not indemnify Appellee against the losses incurred in this accident.

ARGUMENT

There Was No Evidence of Wanton Negligence

It is to be conceded that if there was evidence of wanton negligence on the part of Appellee, determination of the

case should have been left to the jury, because the District Judge properly held that the indemnity Agreement would not be enforceable upon public policy grounds if wanton negligence was involved. But, we submit, the District Judge properly found there was insufficient evidence of any wanton negligence on the part of Appellee to justify submitting the matter to the jury.

Appellant cites *S.P. v. Barnes* (Arizona Court of Civil Appeals, Div. 2, June 17, 1966) and *Alires v. S.P.*, 93 Ariz. 97, 378 P.2d 913 (1963) as support for its argument that evidence of wanton negligence existed. Those cases are clearly no parallel to the one at bar; they both involved heavily-traveled public crossings, where there was no flagman and no mechanical warning devices. The case at bar involves a private road crossing, where a number of special safeguards were provided; there was a flagman; there was a mechanical indicator affording advance warning of a train's approach; and there was a special switch for controlling the railroad block signals by which oncoming trains are governed.

The *Alires* case is clearly distinguishable on other facts; that accident occurred at night; it occurred within the city limits; there were obstructions to the motorist's view; and the train was going 79 miles per hour.

The *Barnes* case is also distinguishable on other facts.

There was evidence the train was going 80 miles per hour. There were obstructions to the view. The accident occurred at night, and in the environs of a populous city, Tucson. The court pointed out that the crossing was more heavily traveled than in *Alires*.

In the case at bar, none of these factors was present; the accident did not occur at night; there was no city (large or small) even in sight; and there were no obstructions to the view.

The cited case of *Bryan v. S.P.*, 79 Ariz. 253, 286 P.2d 781 (1955) is also clearly inapplicable. That case involved making a "flying switch" of unlighted freight cars (without brakes and out of control) at night, and without warning signals or flagmen, being kicked over a public crossing downtown in the City of Phoenix.

We must pause here to observe that it was obviously the intent of the Private Roadway Agreement, with the safeguards and warning devices provided, that the railroad company's trains would be able to operate as before, when there was no private crossing. The crossing was clearly of no benefit to the railroad company. It was under no obligation to provide such a crossing. It was purely an accommodation.

We turn now to the definition of the term "wanton negligence", in order to review the District Judge's decision that evidence thereof was insufficient in this case to create an issue for the jury.

Before the introduction of evidence in the case, the District Judge gave the following definition of wanton negligence to the jury:

"The word 'wanton' as used, as I will use it in the instructions I will give you, indicates a reckless disregard of the rights of others, or a reckless indifference to the results.

In this connection, I instruct you that by a reckless disregard for the rights of others, or reckless indifference to results, as those words have just been used, is meant the intentional doing, an intentional doing of an act, or the failure to do an act which it was the duty of the defendant to do, with knowledge on his part or its part, or reason to have knowledge of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of bodily harm to people on this railroad, on this track, or on the private

roadway, but also a high degree of probability that substantial harm would result to such persons." (42)

The foregoing was taken from Instruction No. 16 of the Arizona Uniform Jury Instructions (R.T. 34). That it is a proper definition is evidenced by *Butane Corp. v. Kirby*, 66 Ariz. 272, 187 P.2d 325; *Barry v. S.P. Co.*, 64 Ariz. 116, 166 P.2d 825; and *Scott v. Scott*, 75 Ariz. 116, 252 P.2d 571, 575, wherein the court said "wanton negligence is highly potent, and when it is present it fairly proclaims itself in no uncertain terms. It is in the air, so to speak. It is flagrant and evinces a lawless and destructive spirit".

With the above definition in mind, can it be said that the conduct of Appellee or its employees was wanton, assuming arguendo that it was negligent at all?

Notwithstanding Appellant's play upon the testimony, the facts are quite simple. Unless one wants to ignore the uncontradicted evidence and believe that the train operators were suicide-bent, one must find and conclude that they put the train in emergency at a time they thought that there was a necessity for doing so. Now if Appellant wants to quarrel with whether the brakes should have been applied three-fourths of a mile away instead of one-half mile away, that is purely a matter of judgment and at most would bear on the question of simple negligence only. In *Butane Corp. v. Kirby*, *supra*, the court said:

"Although conduct to be reckless must be negligent in that it is unreasonable, it must be something more than negligent. It must not only be unreasonable, but it must contain a risk of harm to others in excess of that necessary to make the conduct unreasonable, and therefore, negligent. It must involve an easily perceptible danger of substantial bodily harm or death and the chance that it will so result must be great."

In any case, there is no evidence to show that the train could have been stopped by applying the brakes the moment that the carryall went onto the tracks and stalled, under any interpretation of the testimony.

Appellant suggests that engineer Henderson was wanton in approaching this crossing at over 60 miles per hour in view of his previous experiences with carryalls crossing too close in front of his trains. This accident was not caused by a vehicle crossing too close in front of the train. If it had not stalled it would have crossed when the train was over a mile away. Moreover, why shouldn't engineer Henderson have continued to operate his trains at 60-65 miles per hour, as was customary and allowable? He had duly reported his observation and concern to the Company, and it in turn registered some complaint with Western. Why should he be required to assume that careless driving would take place at the crossing on the day of the accident? As a matter of fact, such did not take place. So the argument is at most academic, and if it had any merit to it, it would concern at best only simple negligence. Besides, if a motorist is in the habit of coming too close to a train at 65 miles per hour, what is to prevent him from coming too close at 30 miles per hour? In either situation the locomotive engineer has no control over such a situation, regardless of his speed, unless he brings his train to a complete stop at the crossing every time. Such was never intended by the Agreement.

Appellant also argues that there is evidence to indicate that engineer Henderson was not keeping a proper lookout ahead. There is no such evidence. The fact that there was some variance between Henderson's account of the movements of the vehicle at the crossing and Kness' account of same, is no inference that Henderson was not looking. He described what he saw, as it appeared to him from a consid-

erable distance away. His remark of concern to the fireman when he saw the carryall approach the crossing from over one-half mile away, "I hope he stops" (R.T. 292, 293); his sounding of the whistle and ringing of the bell; and his placement of the train in emergency half a mile away; these are undisputable facts which prove Henderson was maintaining a lookout. Moreover, failure to keep a proper lookout would not amount to wanton negligence, for there was no reason to anticipate that a vehicle would stall on the tracks. None had ever stalled before. Particularly in view of all the precautions and warning devices which had been provided for the protection of this crossing so as to ensure the right of way and safety of Appellee's trains, the operators of the train had no reason to anticipate that the crossing would be obstructed. Furthermore, we take the position that because of such precautions and right of way preserved by the Agreement, the railroad company had a right to operate its trains by remote control if it so desired, without any lookout. So we do not concede for a moment that there is even any evidence of simple negligence, although we need not go that far to support the District Judge's ruling.

In conclusion, we come back to the testimony of Kness, Western's carryall operator, for conclusive proof that Appellee was not guilty of wanton negligence. Remember that when his machine started to go upon the crossing the train was then only a mile or better away. And remember that it takes from one to one and a half miles to stop this train. There was no reason to place it in emergency at this point, because Kness' machine was still moving, and anyway, whether the train could have stopped in that distance would be sheer conjecture. The carryall continued to roll until it was almost entirely in the clear. When it stopped and could go no further Kness looked up and saw the red head-

light. This means that the emergency brakes were on at that time. The train was then one-half mile away. These are the cold facts. They do not evince any lawless and destructive spirit on the part of anyone, least of all the operators of the train. In our opinion these facts do not even constitute evidence of simple negligence. There is insufficient evidence to indicate that there was any possibility of avoiding the collision even when the carryall first went onto the crossing, much less afterwards when it stopped. And even if there were such a possibility, failure to take advantage of it at that time would only be an error of judgment—not wanton negligence.

There was nothing for the jury to try, and the District Judge properly directed a verdict for Appellee.

The Collision Was Caused by or Arose Out of the Presence, Maintenance, Use or Removal of Said Roadway

The indemnity Agreement is unequivocal and unambiguous. It plainly provides indemnity for any loss to Appellee “caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of Railroad”. The above indemnifying clause even commences by stating why, viz: “In consideration of the exposure to hazard of the operations of Railroad by reason of the construction, maintenance and use of said roadway, * * *”

The unmistakable intent of the Agreement is further manifested by these additional provisions: That Appellant “shall not obstruct, or interfere with, the passage of Railroad’s trains” (Clause 3); and that Appellant shall carry insurance covering its liability under the contract, with limits of not less than \$250,000 property damage (Clause 22).

Appellant's argument that the collision and resulting damages to Appellee were proximately caused by the negligence of Appellee and, therefore, were not "caused by or arising out of the presence, maintenance, use or removal of said roadway" is wholly without merit. The courts have universally held that the term "arise out of" or "arising out of" is not to be confused with proximate cause. In other words, it is clear that, from the standpoint of negligence law, the negligent manner (if any) of operating Appellee's train could be deemed to be the proximate cause of the collision without negating the fact that the collision was caused by or arose out of the presence, maintenance or use of the private roadway. In *Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181, 154 A.L.R. 1088 (Mo. 1944), the court said that the words "arising out of" were ordinarily understood to mean "originating from" or "having its origin in", "growing out of" or "flowing from". The court also said:

"The policy, by its terms, does not require a finding that the injury to respondent was directly and proximately caused by the use of the automobile, or caused by the automobile itself, or that the injury occurred while the automobile was in motion or operation. * * *

We must hold that the policy in suit does not require that the injury be the direct and proximate result, in any strict legal sense of that term, of the use of the automobile covered by the policy."

In *Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571 (Pa. 1961), the court said that "arising out of" means causally connected with, not proximately caused by, and that a "but for" causation, that is, a cause and result relationship, is enough to satisfy the provision of the policy.

In the case of *Merchants Co. v. Hartford Accident & Indemnity Co.*, 188 So. 571 (Miss. 1939), where the injury was caused by poles negligently left in the road after the

covered vehicle had been extricated from a ditch and had departed, the court said:

“Our conclusion, under a policy such as is here before us, is that where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation,—which is to say, that the event which breaks the chain, and which, therefore, would exclude liability under the automobile policy, must be an event which bears no direct or substantial relation to the use or operation; and until an event of the latter nature transpires, the liability under the policy exists.”

In the case of *Eastern Trans. Co. v. Liberty Mutual Cas. Co.*, 144 A.2d 911 (N.H. 1958), in which the question was whether or not an accident arose out of the permitted use of the insured vehicle, the court said:

“The Liberty policy does not require a finding that the injury to Bundy was directly and proximately caused by the use of the Emerson vehicle but only that the injuries were caused by accident ‘arising out of the ownership, maintenance or use of the automobile.’ ”

In the case of *Avery v. American Automobile Ins. Co.*, 166 S.W. 2d 471 (Mo. 1942), the policy covered injuries caused by equipment rented or leased by the assured. A person was injured by a pump (a piece of equipment rented or leased by the assured), when skids, on which it was being lowered, gave way. The court recognized that the defective skid was the proximate cause of the pump’s fall, rather than any defect in the pump. The court, nevertheless, held that the injury was “caused by” the leased equipment within the provisions of the policy. Note also, *Red Ball Motor Freight*

v. Employers Mutual Liability Ins. Co., 189 F.2d 374 (5th Cir. 1951) and *American Automobile Ins. Co. v. Master Bldg. Supply & Lbr. Co.*, 179 F. Supp. 699.

In the case at bar, it cannot be reasonably contended that the collision did not arise out of the use of the private roadway by Appellant. Obviously, the collision would not have occurred but for the presence of the carryall upon the private roadway. Whether or not the collision was proximately caused by the operation of the carryall, by the operation of the train, or by both is immaterial. The hazard against which Appellee desired protection by the Private Roadway Agreement was the hazard created by the presence of large earth-moving equipment on its railroad track. And, it was the presence of such equipment on the track which gave rise to the collision.

All of the cases cited by Appellant are distinguishable or simply inapplicable. Cases are cited involving indemnity agreements which were held too general and indefinite; such is not the case here. Other cases are cited on the subject of proximate cause; these also are inapplicable.

The plain, obvious fact in this case is that the collision would not have occurred had not Appellant's vehicle stopped or stalled upon the railroad tracks of the private roadway in question. So long as that fact is true, the alleged negligent handling of the train is absolutely immaterial, because of the terms of the indemnity Agreement.

The railroad company was under no obligation to Appellant to permit it to cross the tracks. Absent any crossing of the tracks by Appellant, Appellee would be subjected to no hazard whatsoever. In giving Appellant permission to cross its tracks, Appellee received absolutely no benefit. All it did was accommodate Appellant, thereby obviously incurring a great hazard to itself. This was the reason for the indemnity Agreement. And the very hazard contemplated materialized

when Appellant's stalled vehicle blocked the oncoming train's path.

The Case of *County of Alameda v. S.P. Co.*, 360 P.2d 327 (Calif.), cited on page 29 of Appellant's Brief, affords no support for the contention that the indemnity agreement here was not intended to cover the loss arising from the collision in question. That case involved a claim of indemnity for breach of one of the terms of an agreement. There were express provisions of indemnity with respect to other terms of the agreement, but none with respect to the term that was breached. It is easy, therefore, to understand why the court refused to impose, as it said, an additional "independent obligation of indemnity by implication". (p. 333) That is not the case here; Appellant's obligation to indemnify Appellee is express, not implied.

The *Perry v. Payne* case, 66 Atl. 553, cited at page 31 of Appellant's Brief, a case in which indemnity was denied because of the indemnitee's negligence, is of no value whatever, because the indemnity agreement there did not contain the provision "regardless of any negligence of (indemnitee)". The court there simply refused to read such a provision into the agreement by implication. No such need exists here.

Boise Cascade Corp. v. Nicholson Mfg. Co., 221 F. Supp. 135, and *S.P. Co. v. Layman*, 173 Ore. 275, 145 P.2d 295, are in the same category as *Perry v. Payne*, *supra*.

Appellant contends that because Appellee is a common carrier and author of the Agreement, the use of the phrase "caused by" was employed with the meaning ascribed to it in common carrier cases. The decisions cited are inapplicable because Appellee was not acting in its capacity as a common carrier in its Agreement with Appellant. It was acting purely as an indemnitee, an insured. The controlling decisions are those previously cited herein construing the phrase "arising out of".

The *Standard Oil Co. v. Payne* case, 190 N.W. 769, cited at pages 33, 34 and 35 of Appellant's Brief, is not analogous. The distinction is that there the indemnity agreement covered losses "arising from operation of said side track for benefit of second party". The loss did not arise therefrom; it arose from operation of the railroad's *main line* for its *own* benefit, and thus the indemnity was held not to apply.

We reiterate, Appellee's loss here falls within the letter and the spirit of the indemnity Agreement.

The controlling authorities in this case are:

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U.S. 91, 44 L.Ed. 84, which upheld as valid an agreement exempting a railroad from liability in the event of casualty regardless of its own negligence (so long as such agreement did not involve a common carrier relationship between the railroad and the other contracting party). This principle is stated in 17 *C.J.S.* Contracts, Sec. 262, p. 1166; 175 *A.L.R. Annotations*, p. 94; and 13 *C.J.S.*, Carriers, Sec. 117, p. 229.

Southern Pac. Co. v. Morrison-Knudsen Co., 338 P.2d 665 (Ore.), which upheld and enforced the appellant construction company's agreement to indemnify the railroad company from liability resulting from the presence or use of an unloading facility on a spur track installed for the construction company's sole use, regardless of any claimed negligence on the part of the railroad.

Rhinehart v. Southern Pacific Company, 38 F. Supp. 76, which held enforceable and not against public policy of Arizona, clauses in a lease and spur track agreement exempting the railroad from liability for losses caused by railroad's negligence.

The *Southern Pacific v. Morrison-Knudsen* case fits here like a glove. It is to be noted that in that case there was no provision in the indemnity agreement as we have here that railroad would be indemnified "regardless of any negligence

on its part". Notwithstanding the absence of such specific provision, the court held that the agreement could not be construed otherwise. Here in its contract with Western Constructors, the same railroad company employed a similar contract of indemnity, this time specifically providing for indemnity "regardless of any negligence or alleged negligence" on its part.

The Court Did Not Err in Placing Burden of Proof on Western

Appellee established a *prima facie* case of Appellant's liability under the indemnity clause of the Private Roadway Agreement, upon the latter's admission of these facts: (1) The existence of the Private Roadway Agreement (Ex. 4), and (2) that a collision occurred at subject crossing between one of Appellant's vehicles and Appellee's train. (Defendant's Answer)

These facts were all that were necessary in order to establish Appellee's right to indemnity under the Agreement for losses arising out of the presence or use of the crossing by Western.

The burden of proof was then on Western, to offer proof in support of its contention that the Agreement was unenforceable because of Appellee's alleged wanton negligence.

The crux of Appellant's argument seems to be that Appellee did not prove that the presence or use of the crossing "legally" caused or gave rise to the accident.

In answer, we submit that under the appropriate definition of the term "arising out of", as used in the Agreement and as previously discussed herein, mere proof of the collision between the train and the carryall at the crossing, is conclusive proof that the "presence" or "use" of the crossing caused or gave rise to the accident. There is no room for a finding or conclusion to the contrary, under the correct definition of terms used in the Agreement.

Appellant's argument here is really a repetition of its previous argument, which we have already disposed of.

Language of Indemnity Agreement Is Crystal Clear

Appellant's final argument is largely intertwined with its previous argument that the Agreement is equivocal and ambiguous. This we believe we have demonstrated not to be the case.

The contention seems to be that it is unclear what the phrase "regardless of any negligence or alleged negligence on the part of any employee of Railroad" modifies. The phrase is superimposed upon the entire indemnifying clause. It obviously means that there will be indemnity regardless of any negligence on the part of railroad's employees, under all the circumstances outlined in the entire sentence. No amount of juggling or diagramming can possibly change its clear meaning. In our opinion the sentence cannot even be improved upon. Appellant's diagram of the sentence is self-serving. The phrase "regardless of any negligence, etc." obviously modifies each of the (indemnifying) verbs.

CONCLUSION

We respectfully submit that the District Court properly interpreted the indemnity Agreement in accordance with its plain, unequivocal and unambiguous language, and that it properly concluded that there was no evidence of wanton negligence on the part of Appellee. The judgment of the District Court should be affirmed and the case remanded for trial to determine the amount of Appellee's damages.

Respectfully submitted,

EVANS, KITCHEL & JENCKES

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

RALPH J. LESTER
Ralph J. Lester

No. 20939

IN THE

United States Court of Appeals

1966 Term

WESTERN CONSTRUCTORS, INC.,
a corporation,
Counterclaimant-Appellant,
vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC.,
a corporation,
Defendant-Appellant,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Plaintiff-Appellee.

Appeal from the
United States
District Court for
the District of
Arizona

REPLY BRIEF OF COUNTERCLAIMANT-APPELLANT
AND DEFENDANT-APPELLANT
WESTERN CONSTRUCTORS, INC.

SNELL & WILMER
JENNINGS, STROUSS,
SALMON & TRASK

Attorneys for Counterclaimant-
Appellant and Defendant-
Appellant, Western Constructors-
Inc.

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THE APPELLEE'S STATEMENT OF THE CASE

Rule 18 of this Court provides in part:

"His (appellee's) brief shall be of like character with that required of the appellant, except that no specifications of error shall be required, and no statement of the case unless that presented by the appellant is controverted."

Appellee has not pointed to any factual statement in Appellant's Opening Brief which is challenged.

Instead of taking issue with the factual picture presented by Appellant thereby bringing into focus disputed areas in the evidence and the reasonable inferences therefrom, with appropriate record references, Appellee has presented a watered down and abbreviated statement of the case without either challenging or agreeing with Appellant's Statement.

In order that Appellant may not likewise seem unwilling to fairly meet facts or inferences stated by Appellee, Appellant will isolate the few material facts stated by Appellee as facts which are thought by Appellant to be either inaccurately or unfairly stated and deal with them.

Our main criticism of Appellee's Statement of the Case, other than its avoidance of any specification of error in Appellant's Fact Statement, is its failure to accurately report or give consideration to large segments of Appellant's evidence which Appellee simply ignores. Even a hungry man may turn quickly from a dish found quite unpalatable. Could it be that perhaps Appellee has turned quickly away from a consideration of all of Appellant's evidence for the reason it has little stomach for many of the facts in evidence?

APPELLEE'S POINT A: APPELLEE SPEAKS OF THE PRIVATE CROSSING AS "PURELY AN ACCOMMODATION" (BRIEF OF APPELLEE, HEREINAFTER B.A.) AND ALSO STATES "OTHER PHYSICAL MEANS" WERE AVAILABLE BY WHICH THE DIRT FILL COULD BE TRANSPORTED OVER THE TRACKS — I.E., BY AN OVERPASS TO THE WEST (B.A. 2).

This argument of Appellee does not present a matter of great significance. However, Appellee implies Appellant was in some fashion advantaged by use of this private roadway. In fact, the arrangement was one between the State of Arizona and Appellant

(R.T. 98, Deft's Ex. V in Evid.). The State of Arizona simply told the bidding contractors, including Appellant, by its "Memo to Contractors" (Deft's Ex. V in Evid.) that this was the crossing to be used and they were to be "guided accordingly." We assume Southern Pacific had good and sufficient reasons for authorizing the crossing, but certainly all Appellant or other bidders would have done had use of the overpass been required would have been to increase the contract bid price accordingly.

In this connection, Appellee points to the various mechanical safeguards of which it says "these were the precautions taken by the railroad to guard against accidents" (B.A. 3). Appellee then states (B.A. 12): "Furthermore, we take the position that because of such precautions and right of way preserved by the Agreement the railroad company had a right to operate its trains *by remote control if it so desired, without any lookout.*" (Emphasis supplied).

It would appear from the record that this was the position taken and in fact acted upon by engineer Henderson, although he refused to be quite as forthright and candid in his testimony about his attitude toward any persons who might be upon the tracks of railroad as are counsel for Appellee in Appellee's Brief.

The query naturally suggests itself: "What precautions did the railroad company take to prevent injury to others?" By rough calculation, a simple reduction by one-third in railroad's usual speed through this area for one mile approaching the crossing would only delay the overall elapsed time of the train from Gila Bend to Tucson by less than one minute. This was an ordinary freight train hauling ordinary freight. An examination of the speed tape (Deft's Ex. V in Evid.) discloses that the train was easily maneuverable as to slowing down and speeding up, contrary to Appellee's boldly stated claims.

APPELLEE'S POINT B: THE RED HEADLIGHT AND THE EMERGENCY APPLICATION OF THE BRAKES ARE ASSERTED BY APPELLEE TO HAVE OCCURRED WHEN

THE TRAIN WAS ONE-HALF MILE FROM THE PRIVATE CROSSING.

Appellee fixes the point when the headlight of the train engine turned red, or the red headlight was turned on, as if it were a clearly settled fact. Such is not the case.

Both Kness, the carryall driver, and Avila, the crossing watchman, admitted that they were very excited as they pushed the carryall in the face of the oncoming train; ran to see if it was clear of the track; pushed again; and then raced for safety, (R.T. 189, 237) so much so that accurate observation was not possible (R.T. 239). Indeed every experienced trial judge and lawyer would know this would be the fact.

Kness variously stated as to where the train was when he saw the headlight was red in color: "it might have been" (R.T. 186, 187), "it was possible" (R.T. 187), he "couldn't say for sure" (R.T. 189), so that against his background of impending great danger accurate observation manifestly was impossible and his statements were less than an educated guess.

Appellee then argues: "The significance of the red headlight on the train is this * * When the train brakes are put in emergency this light turns red automatically." (B.A. 5). Appellee then flatly states (B.A. 7): "The significance of the red headlight seen by Avila and Kness (Western's own employees and witnesses) when the train was half a mile away proves that the brakes were on * * ." Appellee then says (B.A. 7): "* * * the only permissible inference raised by the speed tape is that during approximately the first half mile of brake application the train's inertia was not yet overcome and its speed not much affected."¹

When we recall the engineer Henderson testified that when in an emergency application of the brakes "each and every brake on

¹The thought comes to mind that the mere operation of a train of this size with brakes so inadequate in and of itself could well be found to constitute wanton negligence. *Womack v. Preach*, 63 Ariz. 390, 163 P.2d 280).

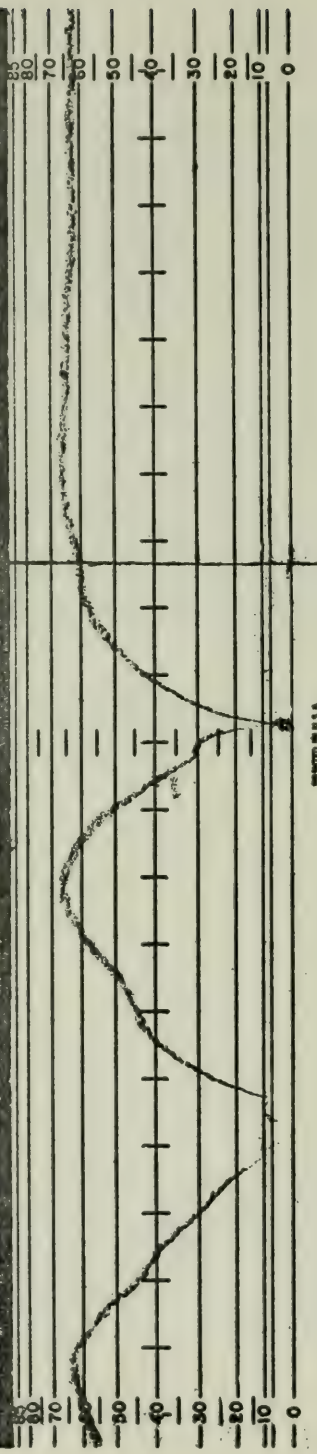
the entire train from the head of the engine to the caboose" is locked against its brake drum so tight that "many times" the wheels are "actually sliding" (R.T. 352, 353), we wonder if Appellee really expects this statement of fact and argument to be taken seriously. If Appellee does, it tosses no bouquets to Court or counsel for intellectual attainments or any knowledge of elementary principles or physics.

Indeed an examination of this same speed tape (Deft's Ex. V in Evid.) discloses that in non-emergency situations and therefore less drastic brake applications, for some strange and unexplained reason the brakes apparently work much better. For the convenience of the Court we reproduce here two excerpts from this speed tape showing the train movements prior to approaching the accident scene which demonstrates the complete lack of substance to this contention.²

² Appellant does not suggest that these two excerpts are true samples of the train movements for they are selected as emphasizing normal stopping and starting up train operation when a non-emergency stop is indicated.

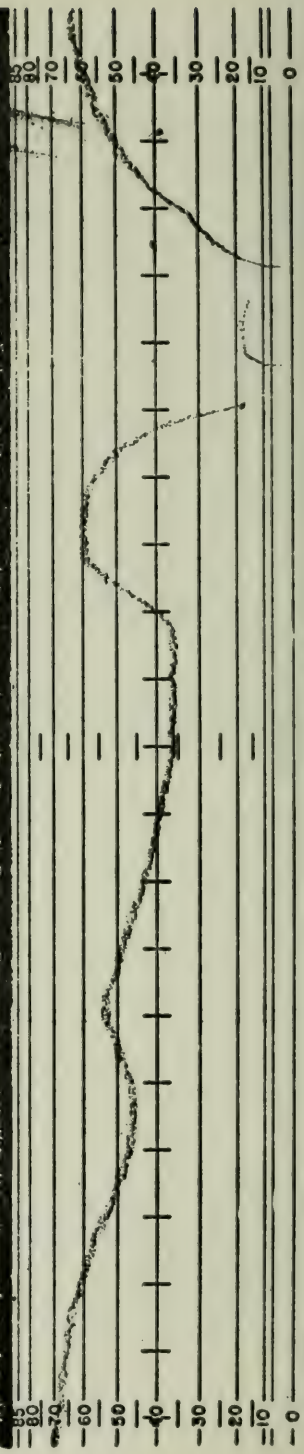
(The speed tape As shown on page 6 should be read held horizontally. The printer's requirements dictate that it be reproduced in vertitcal position.)

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APPELLANT'S POINT C: THE TESTIMONY OF THE TRAIN PERSONNEL.

Appellee attempts to smooth out the mountains and canyons in the testimony of Henderson and the fireman, Brothers, as to where the train was with reference to the crossing and the carryall at various times by a table (B.A. 6) which is incomplete and but partially accurate. However, the most serious defects in the testimony of the train personnel which occurs in their testimony is as to what *in fact they saw actually happening and when they saw it happen.*

Confusion as to where a witness was, distance wise, from a given point when an event occurs can be explained, in part at least, upon the basis that human recollection as related to time and distance can be and often is inaccurate. But no such charitable explanation is available to gloss over the positive statement that a witness saw something which in fact was not there and which did not in fact occur.

The temptation is great to repeat again the seriously incriminating evidence reviewed in Appellant's Opening Brief (20-27) from which the conclusion reasonably follows that Henderson and Brothers were in fact not keeping a lookout ahead even though they knew the crossing ahead was dangerous to the life and property of others. We believe the matter was adequately covered in Appellant's Opening Brief and hence do not pursue it further here. We merely observe that if Kness in fact jumped off the carryall and was attempting to keep it rolling when the train was in excess of a mile away, then the testimony of Henderson and Brothers is simply either a figment of their imagination or a deliberately contrived story to cover up their failure to keep a lookout ahead.

APPELLEE'S POINT D: APPELLEE'S ARGUMENT RELATING TO WANTON NEGLIGENCE (B.A. 11, 12, 13).

Appellee asks:

"Moreover, why shouldn't engineer Henderson have con-

tinued to operate his trains at 60-65 miles per hour, as was customary and allowable? He had duly reported his observation and concern to the Company, and in turn registered some complaint with Western. Why should he be required to assume that careless driving would take place at the crossing on the day of the accident?"

We should not have been surprised to have read such a question posed by railroad counsel if written around the turn of the century; today it is a little shocking.

But since the question is posed perforce Appellant will answer it:

The reason Mr. Henderson should not have continued to operate the train upon the assumption that no "careless driving would take place at the crossing" was because he knew it was a crossing at which he expected "someone might get hurt" (R.T. 333, 334). It just might happen that one of his fellow men might be in the path of his train, carelessly or otherwise, and therefore Mr. Henderson should consider his obligation and that of his employer to exercise that care which one normal human being should have for another who might be in peril.

Appellee (B.A. 3) recounts, almost with an air of pride, the various precautions which it took to avoid harm to its trains. It has no place, however, in the record to point to, with or without pride, where it recounts the steps it took to avoid injuring others.

Appellee then queries if Appellant would quarrel as to whether the brakes should have been applied three-quarters of a mile away instead of one-half mile away, as Appellee assumes to have been the fact. Appellant's quarrel is not with whether or not the brakes should have been applied one-half or three-quarters of a mile away; Appellant's quarrel is with the plain fact the brakes were not applied at all—or at least in practical effect insofar as stopping or slowing the train is concerned, they were not applied at all.

Finally, Appellee argues that there was no reason to expect

a carryall would stall on the tracks—none had ever stalled there before. Appellee would hide and direct attention from the jugular vein of its liability for wanton negligence. We are not here dealing with what might happen. We are here concerned with what did happen, with the *fact* that the carryall *was so stalled in plain sight* of the engineer while the train was over one mile away and on a crossing *at which the engineer knew* there was a hazard to others.

We are here concerned with the fact that the engineer either did not see the stalled vehicle upon this crossing where he was on notice vehicles and persons might be involved, or if he saw it, he simply decided to "let the chips (and railroad cars, carryalls and bodies) fall where they may."

The balance of the miscellaneous arguments made by Appellee are bottomed upon selected witness statements, out of context with the evidence and the entire case, and hence are not meaningful or helpful when viewed in the light of the complete factual picture as developed from all the evidence in the case.

APPELLEE'S DISCUSSION OF THE ARIZONA WANTON NEGLIGENCE CASES

Appellee considers the Arizona wanton negligence railroad cases and pretty much brushes them off upon the basis that each of two cases, *Southern Pacific v. Barnes* (Arizona Court of Civil Appeals, Div. 2, June 17, 1966) and *Alires v. Southern Pacific*, 93 Ariz. 97, 378 P.2d 913, are distinguishable in that principally heavily travelled crossings were involved in each case.

In so contending, Appellee argues without giving thought to the reasons for the Arizona Court's emphasis upon this fact in each case. The only purpose served by the proof in each case was to show that the railroad and its operating personnel were upon notice that someone might be injured at the crossing in question.

Here we need not, although it is available, rely upon this type of circumstantial evidence to show the engineer should have been

alert to danger at the crossing. We have his own sworn admission that he knew of the hazard and in fact expected that someone "might get hurt at the crossing." This case, if anything, because of this, is a stronger case for a finding of wanton negligence than either *Alires* or *Barnes*.

The *Bryan* case (79 Ariz. 253, 286 P.2d 781) is also brushed off with the reasoning that, again the case involved a crossing at which danger could be anticipated and also a flying switch of a freight car "without brakes and out of control." The danger was known and real at Picacho and, while the train had brakes and an engineer's hand at the throttle, the engineer who had the responsibility for exercising control over the train was quite insensible to his responsibilities. Control not exercised and brakes unused do not add up to freedom from wanton negligence—quite the contrary.

We note in Appellee's discussion of Arizona cases an entire absence of any reference to the Arizona case of *Southern Pacific v. Bolen*, 76 Ariz. 317, 264 P.2d 401, considered at pages 13-14 of Appellant's Opening Brief, in which the Arizona Supreme Court aligns itself with the majority of the courts in the United States in holding a railroad to a humanitarian standard of care even as to anticipated trespassers. Why this oversight is unexplained. It may be that while counsel for Appellee was preparing to deal with this particular phase of Appellant's Opening Brief the title to an old song was running through his mind.³

APPELLEE'S ARGUMENT THAT THE COLLISION WAS "CAUSED BY" OR "AROSE OUT OF" (ETC.) USE OF THE ROADWAY (B.A. 13-19).

Appellee first argues that in some fashion the indemnity agreement is enlarged or bolstered by a wholly independent contract clause of the Private Roadway Agreement, which clause is to the effect that Western Construction should not obstruct or interfere with the passage of railroad's trains. Quite the contrary

³ "Absence Makes the Heart Grow Fonder."

result is reached if the clause is examined against the entire agreement. This provision would have been entirely superfluous if railroad had considered that the indemnity agreement here sued upon was as broad and all inclusive as railroad now contends.

Appellee next attaches significance to the contract provision requiring that Appellant procure not less than \$250,000 property damage insurance, which reference Appellee justifies as being for the stated purpose of showing that Western was assuming broad responsibilities to railroad for damage occurring at this crossing.

Again, quite the contrary conclusion follows. Certainly had Western been fairly advised that it was to become, in fact, an insurer of the safety of railroad's trains passing over this roadway, even though the loss was in no fashion the fault of Western and was the sole result of railroad's negligence (over which Western would have no control), far higher limits of insurance would have been sought by Western. It is, we hazard the guess, doubtful if any solvent and knowledgeable insurance company would have written such a risk at a premium Western could afford to pay. The very size of the railroad's claim in this case (\$750,000) reasonably points to the conclusion that neither railroad nor Western contemplated any such broad liability exposure as railroad now asserts Western assumed.

Appellee relies upon seven insurance cases as authority for the meaning it would attach to "caused by" or "arising out of." Appellant was unable to persuade the District Judge that cases interpreting the coverage afforded by a policy of insurance written by an insurance company in the business of insuring risks and for which it has received a premium are of no value in interpreting language of an indemnity agreement written by the indemnitee and imposing an indemnity liability for the negligence of the indemnitee upon a non-compensated indemnitor—indeed in this case, a "captive" indemnitor.

We are however, not disheartened, and again assert, with confidence, that such cases as these (*Schmidt v. Utilities Insurance Co.*,

182 S.W.2d 181, 181, 154 A.L.R. 1088; *Manufacturers Casualty Insurance Company v. Goodville Mutual Casualty Co.*, 170 A.2d 571; *Merchants Co. v. Hartford Accident & Indemnity Co.*, 188 So. 571; *Eastern Trans. Co. v. Liberty Mutual Casualty Co.*, 144 A.2d 911; *Avery v. American Automobile Insurance Co.*, 166 S.W.2d 471; *Red Ball Motor Frieght v. Employers Mutual Liability Insurance Co.*, 189 F.2d 374; and *American Automobile Insurance Co. v. Master Bldg. Supply & Lbr. Co.*, 179 F.Supp. 699 (B.A. 14, 15, 16)) are not, as Appellee apparently convinced the District Judge, of any value as precedents in a case such as this. Each deals with the coverage afforded by a policy written by an insurance company and for which it was paid a premium. We will not, therefore, take the time to analyze or treat them further.

Appellee rules out railroad language in considering the meaning of these terms, "arising out of" and "caused by" B.A. 17), upon the ground that Appellee was not here acting as a common carrier. Appellee in so doing shoots wide of the mark. The argument was that since a common carrier—a railroad—wrote the agreement, it was appropriate to look to railroad language to see what the railroad at least had in mind. Such seems in keeping with usual rules of contract construction.

Appellee mainly relies upon *Southern Pacific v. Morrison-Knudson Co.*, 338 P.2d 665 (Ore.) However, other than reaching a conclusion palatable to Appellee, the case is not otherwise helpful. There the indemnitor was directly advantaged by the agreement for a bunker; it sought the agreement and it received a definite advantage from it. Secondly, the indemnity agreement was direct and clear so that the indemnitor was on notice of its obligation. Thirdly, the injury was the result of the joint negligence of the railroad and Morrison-Knudson; and finally the bunker installation, the subject of the indemnity agreement, was so constructed that it was partly over and partly under the railroad spur track, and the injury resulted from inadequate clearance of the part of the bunker over the spur track from which the parties to the agreement considered damage might result.

Hartford Fire Insurance Company v. Chicago, M. & St. P. Ry. Co., 175 U.S. 91, 44 L.Ed. 84, is authority solely for the proposition that a railroad indemnity contract involving its non-common carrier activities is not contrary to public policy, and *Rhinehart v. Southern Pacific Company*, 38 F.Supp. 76, repeats the oft stated rule that a railroad in leasing property adjoining its railroad can excuse itself from fire loss due to sparks. No one disputes this.

APPELLEE'S ANSWER TO THE BURDEN OF PROOF SPECIFICATION OF ERROR (Op. Br. 36, et seq.)

Appellant can find no real basis for attempting a reply to Appellee's treatment in its Brief of this point which Appellant considered quite persuasively supported by *Guerrero v. American-Hawaiian Steamship Company*, 222 F.2d 238, which this Court decided in 1955, as cited and quoted in Appellant's Opening Brief (36, 37, 38).

In effect, Appellee says that Appellant is wrong and relies upon the assertion as authority for the statement.

This we have understood is known as the rule in the "ipse dixit" case, but we had never understood it was very persuasive authority at a judicial level above that of Justice of the Peace courts.

We will answer Appellee's argument in the same fashion Appellee answered this point in our Opening Brief.

Appellee is wrong and Appellant is right.

THE ASSERTION OF APPELLEE THAT THE LANGUAGE OF PARAGRAPH 6 OF THE PRIVATE ROADWAY AGREEMENT IS "CRYSTAL CLEAR" (Op. Br. 38, 39, 40, 41)

Appellee disposes of this entire problem with the observation (Appellee's Brief 38): "In our opinion the sentence (which comprises the entire Paragraph 6 of the Roadway Agreement cannot even be improved upon."

Thus, with one backward sweep of the hand Appellee brushes

aside the horde of cases holding that a non-compensated surety is favored by the law and that an indemnity agreement collateral to a main contract by which a non-compensated surety is claimed to indemnify another against such others own negligence will not be construed to have that reach unless the intent to do so is clear and unequivocal.

In *Atterbury v. Carpenter*, 321 F.2d 921 (1963) this court said:

"Atterbury was not merely a surety; he was a voluntary surety, not a compensated surety engaged in the business of executing surety contracts for an actuarially-computed premium. See Restatement, Security, supra, Sec. 82, Comment i. As such he is favored by the law, see *Union Oil Company of California*, supra, (349 P.2d 243 (Ore.)) and can raise discharge defenses on the basis of *strictissimi juris* which are not available to compensated sureties."

The courts, when dealing with the claim that a non-compensated surety is obligated to save an indemnitee harmless from the consequences of its own negligence, variously state the test to be applied and met before this conclusion will be reached. All courts seem to require that it be clear the indemnitor intended to and realized the burden which the indemnity agreement placed upon him and that the indemnitee, if the author of the agreement, has clearly stated the obligation to be assumed by the indemnitor. The test is variously stated as "clear and unequivocal"; "there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation"; "must be clearly and unequivocally expressed"; "unless such obligation is expressed in unequivocal terms"; "must be made apparent by clear, precise and unequivocal language."

143 A.L.R. 312, Par. III, p. 315.

175 A.L.R. 8 (sole negligence of indemnitee, p. 32).

Halliburton Oil Well etc. v. Paulk, 180 F.2d 79, C.A. 5 (1950).

- Southern Bell Tel. & Tel. v. Mayor*, 74 F.2d 983, C.A. 5 (1935).
- Brown v. Moore*, 247 F.2d 711, C.A. 3 (1957). *Cert. den.* 78 S.Ct. 148
- Camden Safe Deposit etc. Co. v. Eavenson* (Pa.), 145 A. 434.
- Turner Const. v. W. J. Halloran etc. Co.*, 240 F.2d 441, C.A. 1 (1957).
- Ambrose v. Standard Oil Co.*, 214 F.Supp. 872 (1963) (Judge Kilkenny)
- Boise Cascade Corp. v. Nicholson Mfg. Co.*, 221 F.Supp. 135 (Judge Salomon).
- Southern Pacific Co. v. Layman*, 173 Ore. 277, 145 P.2d 295, (1944) (Almost directly in point).
- Perry v. Payne* (Pa.), 66 A. 553, 11 L.R.A. (N.S.) 1173.
- Thompson-Starrett Co. v. Otis Elevator Co.*, 2 N.E.2d 35, Court of Appeals N.Y. (1935).
- Basin Oil Company v. Baash-Ross Tool Co.*, 271 P.2d 122 (1954) (Cal. Ct. Appeals).
- Pacific Indemnity Co. v. California etc. Ltd.*, 84 P.2d 313, 320 (1938) (Cal. Ct. Appeals).
- Smith v. Ohio Oil Co.*, 356 S.W.2d 443 (1962). (Tex. Ct. App.).
- Westinghouse Elec. Co. v. LaSalle Corp.*, (1946). (Sup.Ct.Ill.) 70 N.E.2d 604.
- Williston on Contracts* (Revised Ed.), Vol. 6, Sec. 1825 n.8.

We believe that the indemnity agreement here relied upon by railroad to excuse its own sole negligence is unclear and the obligation imposed upon the licensee obscured and buried under a flood of words and phrases to where its full impact is not appreciated or understood by an expert in sentence analysis even after careful study. Careful study of this paragraph (Par. 6) does not justify any conclusion that Western's obligation, as contended

for by railroad, is clearly and unequivocally spelled out. Even after careful analysis the true meaning of this long and involved sentence (Par. 6) remains uncertain and unclear.

We need not pause to ascertain if this lack of preciseness and clarity is studied or whether, like Topsy, the sentence "just grew." The fact is that it is uncertain and unclear and that railroad either made it so in order to secure ready acceptance of the clause by prospective indemnitors or simply permitted this imprecise phraseology to grow into and become part of the agreement. The legal result is the same in either case.

We hesitate to believe that this contract has not been reviewed from time to time by competent counsel. We are reluctant to conclude that, in fact, such review by learned counsel would lead to the conclusion that as a matter of sentence structure, the sentence would bear no improvement.

It may be that counsel means, in concluding that the sentence structure of the paragraph cannot be improved upon, that for the purpose of railroad and to the end that the onerous burden which railroad now claims it imposes upon a licensee continues to be carefully obscured to trap the unwary, the sentence cannot be improved upon.

We hope not.

CONCLUSION

Appellant, Western Constructors, Inc., respectfully urges that the judgment below should be reversed and with directions to dismiss the Complaint of Railroad, or, in any event, that Appellant be awarded a new trial as to both railroad's Complaint and Appellant's Counterclaim.

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

No. 20941 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

ILMAR KOIVUNEN,

Plaintiff-Appellant,

v.

STATES LINE,

Defendant-Appellee.

APPELLANT'S BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

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APPELLANT'S BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

JURISDICTION

This is an appeal from the judgment of the United States District Court from the District of Oregon dated January 14, 1966 in favor of plaintiff-appellant and against defendant-appellee in the sum of \$1,000, pursuant to a jury verdict (R. 11).

Jurisdiction of the district court was based upon 28 U.S.C., Sec. 1332, and the jurisdiction of this court is based upon 28 U.S.C., Sec. 1291, by reason of a No-

tice of Appeal filed March 1, 1966 (R. 21), after the district court had denied a motion for a new trial on February 7, 1966 (R. 19).

Reference is made to the pre-trial order which superceded the pleadings, and which demonstrates diversity of jurisdiction (R. 3).

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries received by appellant, a longshoreman, on December 23, 1963, while he was loading cargo on appellee's vessel the S. S. OHIO at Coos Bay, Oregon. Appellant was working in a lower 'tween deck hatch when shoring collapsed upon him.

The case was tried to a jury which rendered its verdict in favor of appellant in the sum of \$1,000 (R. 10). Judgment was entered upon the verdict (R. 11) and plaintiff's motion for a new trial and/or additur (R. 13) was denied by the district court (R. 19).

The appeal involves only one question, whether the district court properly submitted the issues of plaintiff-appellant's alleged contributory negligence to the jury. The appellee had charged the appellant with negligence in the following particulars:

1. Failing to keep a lookout of his own safety.
2. Loosening the existing bracing for the upright shoring material prior to roping off or otherwise securing said upright shoring material.
3. Failing to rope off or otherwise secure the up-

right shoring material prior to commencement by himself and the other longshoremen of removal of the existing bracing for the upright shoring (R. 6).

STATEMENT OF FACTS

Plaintiff is a 50 year old longshoreman who has been engaged in that occupation since 1952 and who has worked on all types of vessels and is familiar with the various methods of storing cargo on American vessels in Coos Bay and on the Pacific Coast (Tr. 2-4).

On December 27, 1963 at about 1:00 P.M. plaintiff began work to unload cargo on the defendant's vessel, The S. S. OHIO, at the Georgia-Pacific Dock in Coos Bay (Tr. 4-5). He was working in hatch number two with three other longshoremen, his son Gene, who is also his partner, and Grant Taylor and Harry Meyers (Tr. 5-6). Mr. Taylor and Mr. Meyers were working on the port side (Tr. 6). The cargo consisted of bales of pulp weighing 450 pounds or better stacked up one on top of the other seven or eight high fore and aft in the hatch, and in each of the wings, leaving the center area directly under the hatch open (Pl. Ex. 8).

The S. S. OHIO was loaded in Longview, Washington and it crossed the Columbia River Bar and encountered force 8-9 winds, from about 45 to 50 miles an hour, which would have made the ship pitch and roll moderately in a rough southerly sea (Tr. 57-60). The vessel arrived in Coos Bay and lay at the dock for three or four days thereafter.

The cargo was stowed in the number two hatch as indicated and shored up by vertical boards reinforced by "toms" running from the top of the shoring to the deck where they were nailed (Tr. 10-11). All of the weight of the cargo and the shoring rested against the nail which was placed at the bottom of the "tom" so that a tremendous pressure was created so that when the ship was in movement a little bit of movement of the shoring would loosen the nails and cause the toms to give and drop down (Tr. 10-11).

There was no opposite or lateral bracing against the foot of the tom on the deck, only two little pieces of two-by-fours alongside (Tr. 11).

The usual method of shoring bales of paper on a ship is to make it secure with what is known as an inverted A frame. This is the type of shoring built on practically every ship that has come in and out of Coos Bay. Such a frame, as shown in Plaintiff's Exhibit 10, which prevents the cargo from collapsing the shoring outward or sideways (Tr. 12-14).

Plaintiff and his son began to work on the star-board side of the hatch and the other two longshoremen on the port side. They were ordered to secure the fencing on the aft and forward end of the hatch with a rope and take out the "toms". They were then instructed to take the shoring completely off from the timbers. Plaintiff and his son started from the aft working forward. They secured the shoring with a "gantline" in the aft end and took the "toms" out and had begun to remove part of the shoring (Tr. 6-7).

Plaintiff stopped to move a thermos bottle to the forward end of the hatch where it would be safe and after he had placed the bottle close to the wing of the ship and was walking back to his work, he stopped to pick up a peavey and the shoring at the forward end collapsed and fell on him causing injuries to the plaintiff (Tr. 7-8). The total weight of the lumber which landed on the plaintiff was about six or seven hundred pounds (Tr. 8). Prior to the accident, neither plaintiff nor anyone else had touched the "toms" in that part of the hatch (Tr. 9-10).

Plaintiff was knocked out when the shoring came down and when he came to he had severe pain in his left side below the ribs and had difficulty in talking. He also had pain in his left shoulder and difficulty in breathing. He sat there for about an hour and realized that his right foot was swelling up. He was able to climb the ladder to the deck and reported the accident and was taken home and then to a doctor the same evening (Tr. 16-18).

As a result of the accident, the plaintiff was off work for about fourteen days continuously and during this time his foot swelled up "pretty big" and he had constant headaches. He was treated with aspirin and told to soak his foot and started physical therapy by putting his foot in a whirlpool bath and with massage (Tr. 18-19). He continued to have pain in his left side and his left arm began going dead and getting numb and he continued to have severe headaches. He had great stomach distress after every meal. Although the plaintiff

had a small duodenal ulcer in 1954, plaintiff's physicians testified that his stomach distress was caused by a hiatal hernia, which is a permanent condition and will require future medical care and treatment, probably surgery which would cost at least four to six hundred dollars, together with hospitalization of \$500 (Tr. 75-77, 86-87).

In addition, plaintiff was diagnosed as having a chronic cervical syndrome with a probable nerve root injury, a flat foot and chronic strain of the right foot and soft tissue injury of the left chest with probable pleura damage (Tr. 84-86). The arm and foot conditions, in addition to the hernia, are likely to be permanent (Tr. 88).

On orthopedic examination by a specialist, plaintiff was seen to be suffering from a chronic sprain of the lower and upper areas of the spine, superimposed on a pre-existing dorsal arthritic change and a sprain of the metatarsus arch of the right foot (Tr. 103). The arm pain was referred, that is it was pain that goes down the nerve from the base of the neck (Tr. 103-104). The specialist also testified that the back and foot injuries would be permanent (Tr. 103-104).

Plaintiff claimed to have lost earnings of \$3,500.

Defendant produced two expert witnesses in an attempt to explain why the shoring fell. Captain Devaney testified that the defendant's vessel pitched and rolled as it crossed the Columbia River Bar and that this exerted considerable force against the shoring because the cargo would be working (Tr. 60). He was

of the opinion that after the vessel arrived in Coos Bay and lay along side the dock for about four days, that the shoring was not likely to fall over without outside interference (Tr. 61-62). He also was of the opinion that the shoring used on the ship was proper if it had been rabbeted at the bottom (Tr. 63-64).

Captain Devanney stated that the inverted A frame was the most common type of shoring in use and that it would be used if possible (Tr. 63). With respect to the "rabbeting," Captain Devanney stated that not only is a block used at the end of the brace, but also on either side to keep it from slipping sideways (Tr. 66). Defendant's other expert witness, Mr. Briggs, testified that he was a hatch boss on the defendant's vessel at the time plaintiff was injured. He said that he entered the hatch and looked around the lower 'tween deck area where the accident happened, although he did not make a really careful inspection of the shoring (Tr. 158-159). In fact, he said it was a casual observation (Tr. 159).

He said that on the whole the shoring looked good to him (Tr. 160). He said that the shoring used on the S. S. OHIO was "the next best method" and that the "A frame" type is a much preferred method (Tr. 163-164).

Although the Georgia-Pacific Dock is located in Coos Bay some 11 or 12 miles from the bar, you can have some "pretty fair chops" if there is bad weather and wind blowing (Tr. 160, 165). Captain Devanney testified that if a ship were tied to a dock in port

where there are swells, and the ship is moving, there may be a little pulling out of the nails at the base of a brace against the shoring every time the weight is put on it, this being a matter of force (Tr. 67-69).

SPECIFICATION OF ERROR

I

The trial court erred in denying plaintiff-appellant's motion to withdraw alleged contributory negligence from the jury and in giving the following instructions on contributory negligence:

"The Defendant has alleged that Plaintiff was guilty of negligence and that his negligence was the sole and proximate cause of the accident. The fact that Plaintiff was on board a vessel in the course of his employment did not relieve him of the duty of exercising reasonable care for his own safety. On the contrary, at all times while he was on board the vessel, he was required to exercise that degree of care for his own safety that would be exercised under the circumstances by a person of ordinary care and prudence.

The owner of the ship says the Plaintiff himself was guilty in two respects:

First: In failing to maintain a proper or any lookout for his own safety.

Second: In loosening the existing bracing for the upright shoring without first roping off or otherwise securing the upright shoring.

In determining whether Plaintiff was, himself,

negligent, you may only consider these specifications and no others.

On the claims of negligence made by the Defendant against Plaintiff, the Defendant has the burden of proof.

I instruct you that every person who is in full enjoyment of his faculties of seeing and hearing is required to make reasonable use of all his senses and to maintain a proper lookout with a view to the discovery of perils by which he may be menaced and their avoidance after they have been ascertained.

If you find by a preponderance of evidence that the Plaintiff did not maintain such a lookout, then he would be guilty of negligence. The same would be true if you find that Plaintiff loosened the bracings for the upright shoring and that under the definition of negligence I have already given you, the Plaintiff should have refrained from loosening the existing bracing for the upright shoring without first securing the upright shoring. If either or both of these claims of negligence was the sole cause of the accident, Plaintiff could not recover, but if such negligence merely contributed to the accident, then Plaintiff would be entitled to recover. Although, as I will point out, he would be entitled to recover on a lessor rate, Plaintiff would be entitled to recover even though you find that some of his fellow-employees or the employees of the stevedoring company were negligent, and their negligence likewise contributed to the accident.

In order for Plaintiff to prevail, it is not necessary that he show that the ship was solely at fault. If he shows that the ship was at fault, or the

officers of the ship, Plaintiff is entitled to recover. Plaintiff is entitled to recover even if he himself was negligent, and if you find that the Defendant was negligent.

Some of you have sat in cases involving automobile accidents, which the judge has instructed that if the Plaintiff himself is guilty of contributory negligence, he may not recover regardless of the amount of negligence of the driver of the automobile. But, that isn't true in a case of this kind. He is entitled to recover even if he himself is negligent, provided that he shows that the ship is negligent. But, if both of them are negligent, then he is entitled to recover on a reduced basis, which I will explain to you." (Tr. 183-186).

Counsel for appellant excepted to the instruction as follows:

"Plaintiff excepts to each and every instruction given by the Court on contributory negligence. The plaintiff excepts to the Court's instructing the jury that if they found either one of the charges of negligence made by the defendant was the sole cause of the accident and injury that the plaintiff could not recover—the point of that being lookout—the failure to keep the lookout." (Tr. 197)

Prior to the court instructing the jury, the plaintiff moved to withdraw from the jury all charges of alleged contributory negligence because there was no evidence to support any of the charges. The trial court denied this motion (Tr. 168).

"MR. PETERSON: Your Honor, at this time we might restate the Plaintiff moves to withdraw con-

sideration from the jury any charge of alleged contributory negligence because there is no evidence to support any of the charges.

THE COURT: The motion is denied. There is evidence from which the jury could find that this accident could not have happened except for the negligence of the Plaintiff himself.

The evidence was the shoring was installed at Longview; that the vessel came in heavy seas through the bar down to Coos Bay; and, that at Coos Bay there was little motion; for four days it stayed that way; and then all of a sudden, the Plaintiff goes down and it falls.

The expert testimony was that it's very unlikely that this shoring would have given away, particularly after it had gone through these heavy seas without some human intervention.

If the jury believes that, then they can find negligence or contributory negligence on the part of the Plaintiff." (R. 168-169).

ARGUMENT

The trial court erred in instructing the jury as to contributory negligence and in failing to withdraw the issue of contributory negligence from the jury. There was no evidence to support this instruction, and as a matter of law, plaintiff was free from contributory negligence.

The appellee charged the plaintiff with three specific acts of contributory negligence, namely failure to keep a lookout, loosening the bracing prior to roping off the upright shoring, and failure to rope off the

upright shoring prior to removing the existing bracing. The last two specifications of error present substantially the same idea.

There is not the silghtest evidence that the plaintiff or anyone else in the hold touched the shoring and bracing which collapsed upon plaintiff. In fact, plaintiff steadfastly denied having worked in that area at all (Tr. 9-10, 36-37). Defendant's son, Gene Koivunen, testified that no one had touched the forward braces or shoring prior to the accident (Tr. 49, 52). The only testimony was to the effect that plaintiff and his co-workers were working in another part of the hold at the opposite end, that is from the aft end forward on the starboard side, whereas it was the shoring on the forward end of the hold that collapsed (Tr. 47, 7, 8).

As for the allegation of negligence to the effect that plaintiff failed to keep a lookout, it should be held as a matter of law that none was required under the circumstances or that such failure could not have been a proximate cause of plaintiff's injury. The only evidence was that the plaintiff and his son started from the aft end of the hatch, working forward. They had started to remove the shoring after making it secure with a gantline. He stopped momentarily to move his thermos bottle to the forward end of the hold where it would not be in danger and he placed it on some bales of paper. As he was walking back he stooped over to pick up a peavey and the shoring from the forward end collapsed upon him (Tr. 7-8).

On this state of facts, and this is all the evidence in

the record, the allegation of failure to keep a lookout is not supported in any way and submission of it to the jury permitted it to speculate on this aspect of the case.

Where there is no evidence of contributory negligence, it is error for the trial court to submit any allegations thereof to the jury. In *Fitzgerald v. Polish Ocean Lines*, 337 F.2d 376, 1965 A.M.C. 1369 (C.A. 4, 1964), a longshoreman was injured when a bundle of dunnage fell from storage in the hold. The jury returned an award which was reduced 20% for his contributory negligence. On appeal, the full award of the jury was reinstated because there was no contributory negligence proven.

The case at bar is not unlike that of *Mason v. Mathiasen Tanker Industries*, 298 F.2d 28, 1962 A.M.C. 860 (C.A. 4, 1962). In that case, the plaintiff slipped on engine room oil and fell down a ladder. The defendant attempted to insinuate that plaintiff had a fainting spell, which plaintiff denied. There was no evidence of plaintiff having fainted or having taken any medication. The trial court charged the jury with contributory negligence, but on appeal the judgment was reversed and a new trial given on the issue of damages. In so doing, the appellate court stated as follows:

" . . . the charge was given concerning contributory negligence and the jury was permitted to speculate that in some way the plaintiff's own negligence may have caused him to fall. We believe this was error which may have affected the amount of the verdict." 62 A.M.C. at 866.

A very early case had facts similar to the case at bar. In *Gerrity v. Bark Kate Cann*, 2 F. 241 (D.C. E.D. N.Y., 1880), aff'd. 8 F. 719, libelant was loading grain and while waiting for the spout to be moved, he was sitting down in the 'tween decks. Dunnage was stowed in a rack up above him and while he was sitting there, the rack gave way and the dunnage fell upon the libelant and he was injured. The eminent Admiralty Judge, D. S. Benedict held:

"The evidence leaves no room to contend that the libelant is in any way reasonable for the falling of the dunnage upon him. He had nothing to do with the stowing of it, nor is there any evidence of his having interfered with it after it was stowed; nor was its fall occasioned by any act of his." 2 F. at 242.

So in the case at bar plaintiff had nothing to do with the stowing of the paper nor is there a single iota of evidence of his having interfered with it after it was stowed nor did the shoring fall by reason of any act of his.

It cannot be argued with any logic that plaintiff was negligent in failing to object to the manner in which the shoring was built. This was not the duty of the plaintiff; he was merely at the lowest rung of the level of authority and was hired to simply take orders. This rule has been applied in several recent cases such as *Ballwanz v. Isthmian Lines*, 319 F.2d 457, 1964 A.M.C. 1480 (C.A. 4, 1963) and *Simpson v. Royal Rotterdam Lloyd*, 225 F.S. 947, 1964 A.M.C. 1171 (U.S. D.C. S.D. N.Y., 1964). In the *Ballwanz* case the plain-

tiff longshoreman was injured when a wooden spreader not affixed to a wire sling fell onto him while being withdrawn from the hold. The court held that the use of the spreader in this way was negligent and that the longshoreman had no duty to protest a method which he was instructed to follow, nor was he responsible for the stevedore company's method of operation. The court explicitly refused to apply the doctrine of assumption of risk.

In the *Simpson* case, a longshoreman was injured when an ingot slipped off a load which he was unloading. The court held the ship liable for grease on the ingot and refused to consider the claim of the ship that the plaintiff was guilty of contributory negligence. The court there pointed out that the longshoreman was only following instructions and was injured solely by reason of the defective stow.

Even an extreme case like that of a longshoreman who slipped on a ladder because the rung was too narrow, the appellate court has reversed a trial court's assessment of contributory negligence, holding that the sole cause of the accident was the defective ladder. *Smith v. U.S.A.*, 336 F.2d 165, 1965 A.M.C. 153 (C.A. 4, 1964). The policy underlying cases of this type is that longshoremen are not in a position to protest defective conditions or remedy them and are more or less at the mercy of the employers and should not be held liable in any way for accidents resulting from defective appliances or defective stowage.

The trial court in this case accepted the argument

of the defendant that even though there was no testimony that any of the longshoremen had touched the stowage at the forward end of the hold, they must have done so because nothing else would make it fall. This ignores the testimony of the expert witnesses of the defendant that where a ship is tied to a dock, if the water swells, the ship will move and the cargo will exert pressure against the shoring. Coos Bay is a port where the water does get choppy from time to time if the wind is blowing and one could have chops right off the Georgia-Pacific dock (Tr. 160).

The defendant attempted to emphasize that the stowage was safe and practical because it survived the crossing of the Columbia River Bar in moderately heavy winds. But by the same token, the rough trip across the Columbia River Bar could have so weakened the imperfect bracing of the stowage that even the small choppiness of the water at the Georgia-Pacific dock in Coos Bay eventually broke the bracing loose and caused the stowage to collapse.

CONCLUSION

There is not a single bit of direct evidence to indicate that anyone touched the shoring or the bracing at the forward end of the hold before it collapsed on the plaintiff. The defendant's theories as to what might have caused the collapse remain just that, theories without any factual basis in the record. Even Captain Devaney's testimony was that the type of shoring used in this case was good only if it was rabbeted at the

bottom (Tr. 63), and the evidence is that there was no rabbeting or lateral piece at the foot of the toms or braces to keep them from pulling out (Tr. 11).

On the record then it is clear that there is not a single bit of evidence of contributory negligence on the part of the plaintiff and it was clear error for the trial judge to submit this issue to the jury. The cause should be remanded to the district court for a new trial on the issue of damages alone.

Respectfully submitted,

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APPENDIX**PLAINTIFF'S EXHIBITS**

Number	Description	Iden.	Rec'd.
8	Sketch of inside ship	9	12
10	Sketch of a model ship	15	15
5	Report of Dr. Bauer, M.D.	20	20
1	Sketch of area of ship drawn by Gene Koivunen	50	50
2	A through I medical X-rays	74	74
3	C and D X-rays	102	102
6	Skeleton of foot	171	171

DEFENDANT'S EXHIBITS

Number	Description	Iden.	Rec'd.
22	P.M.A. report	34	34
21	Extract of ship's log	58	58

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD H. ROBINSON

Of Attorneys for Appellant

No. 20941

United States
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for the Ninth Circuit

ILMAR KOIVUNEN,

Plaintiff-Appellant,

v.

STATES LINE,

Defendant-Appellee.

BRIEF OF APPELLEE

*Appeal from the Judgment of the United States
District Court for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

FILED

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STATEMENT OF JURISDICTION

Appellant's Complaint was filed in the Circuit Court of the State of Oregon for the County of Coos and thereafter on November 2, 1964, served on appellee at Portland, Oregon. Appellee filed its Petition for Removal November 5, 1964. These documents do not appear in the Record on Appeal. Jurisdiction of the United States District Court for the District of Oregon was based on diversity of citizenship and the requisite

amount in controversy (R. 3) pursuant to 28 U.S.C.A. § 1441 (a) and 28 U.S.C.A. § 1332.

Judgment was entered in the trial court January 14, 1966 (R. 11). Appellant's motion for additur or in the alternative for a new trial was denied February 7, 1966. (R. 19). Notice of Appeal was filed March 1, 1966 (R. 21). Jurisdiction of the Court of Appeals is based on 28 U.S.C.A. § 1291.

The pleading showing the facts supporting jurisdiction is the Pretrial Order at page three of the Record on Appeal.

SUMMARY OF ARGUMENT

Appellant and his son were the only witnesses to the accident. They claim the shoring spontaneously fell after it had withstood tremendous forces at sea and had sat idle at the dock for four days.

The law does not require the jury to accept the testimony of interested witnesses and may legally be allowed to base its determination on circumstances and reasonable inferences to be drawn therefrom.

The uncontroverted facts in this case make it highly unlikely the shoring would have fallen absent human intervention. Facts developed from appellant himself and his witnesses make it appear that appellant either personally loosened the shoring or was aware it had been loosened. Standing near unsecured shoring which he knew to be loosened clearly justifies the application of contributory negligence.

ARGUMENT

The sole basis of appellant's appeal is his allegation there was no evidence of contributory negligence to justify submitting that issue to the jury and instructing thereon. Appellant's extensive references to the propriety or impropriety of the shoring and the medical testimony in his favor are, therefore, immaterial. Suffice it to say the extent of appellant's injury and damages and the seaworthiness of the vessel were closely contested issues of fact not now before this Court.

Appellee does not contend there was any direct evidence of contributory negligence. Appellee relies solely on circumstantial evidence, which clearly is sufficient proof of any fact.

"Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330, 81 S. Ct. 6, 5 L. Ed. 2d 20 (1960).

This Court has held that circumstantial evidence may properly be found to outweigh conflicting direct evidence. *Rocona v. Guy F. Atkinson Co.*, 173 F.2d 661, 665 (C.A. 9, 1949). In many respects that case is similar to the instant case. There respondent's employees, the only witnesses, denied specifically the acts of negligence the finder of fact attributed to them. The physical circumstances, however, spoke strongly against their denials as in the instant case.

Even in the absence of any direct evidence, the jury

is entitled to draw from circumstantial evidence reasonable inferences based on common experience. *Rutland v. Sikes*, 311 F.2d 538 (C.A. 4, 1962).

In the instant case there is no question that the shoring fell on appellant. If he loosened the bracings on the shoring, or knew they had been loosened by his son, and then voluntarily exposed himself to the shoring, clearly he was guilty of contributory negligence. The circumstances of the accident lead in two steps to the cogent inference that appellant in fact was guilty of such contributory negligence.

I. The Shoring Would Not Have Fallen Without Human Intervention.

The SS "OHIO" crossed the Columbia River bar in strong winds and winter seas when there would have been considerable pitching (Ex. 21, Tr. 58-60, 67). Thereafter, the log shows the vessel pitching and rolling moderately (Ex. 21). The vessel crossed the Coos Bay bar after waiting outside a period of time (Ex. 21). That bar is closed many times because of sea conditions (Tr. 68). The vessel then lay at the dock for four days (Ex. 21). There is no evidence that the vessel moved at all. There was evidence the vessel could have moved a little (Tr. 148), but further evidence showed that it would require swells to make the vessel pitch at the dock (Tr. 68, 69), and there are no swells at that location (Tr. 165). There was no testimony of any movement whatsoever of the vessel at the time of the accident. If there had been such movement appellant or his witnesses would have testified to it since it would have

tended to support his theory of spontaneous falling of the shoring. Despite the rough ocean voyage, the cargo and shoring were upright and intact when the longshoremen entered the hold.

At the time of the accident none of the bales of pulp fell. None, therefore, could have been resting against the shoring when it fell. If appellant's version of the accident is accepted, the shoring simply fell of its own weight, despite the bracings at least leaning, if not secured, against it. Moreover, all of the three ^{bales} tons (Tr. 50, 51) would have had to have collapsed spontaneously at the same instant.

Common experience in these circumstances compels the inference that the shoring and bracing that had withstood tremendous forces and then had stood undisturbed for four days would not have collapsed spontaneously without outside intervention. The circumstances strongly lead to the conclusion that the intervention was human.

II. The Human Intervention Must Have Been Appellant's Act.

Appellant and his son and two other longshoremen were the first workmen in the hold (Tr. 158). Other than the gang boss who made a cursory inspection (Tr. 158, 159), there were no other workmen in the hold (Tr. 5). Appellant and his son worked only on the starboard side; the other two worked only on the port side (Tr. 141).

Appellant and his son were sent into the hold to loosen and remove the exact bracing which fell on him

(Tr. 6). Appellant himself testified that no other person had touched the bracing (Tr. 10).

Appellant was within six feet of the shoring when it fell (Tr. 9). His explanation regarding a thermos bottle need not be accepted. *Delpit v. Nocuba Shipping Co.*, 302 F.2d 835, 838 (C.A. 5, 1962). It is particularly suspect in the light of his testimony that at the moment of the accident he was bending over to pick up a peavey (Tr. 7, 8)—a tool for loosening the braces (Tr. 147). Appellant says all of his work had been performed at the after end of the hatch (Tr. 7, 8), but the peavey, the tool of human intervention, was at hand at the forward end of the hatch within six feet of the shoring (Tr. 7, 8).

As between him and his son, appellant was in charge of the work and the role of the son was that of helper (Tr. 52).

These circumstances make it appear virtually certain that appellant loosened the bracings himself or knew that his son had done so.

The only direct evidence respecting the accident was that of appellant and his son. They denied interfering with the shoring in any way (Tr. 9, 10, 52). The fact that appellant and his son were the only witnesses did not compel the jury to accept their testimony. *Delpit v. Nocuba Shipping Co.*, *supra*.

“ . . . Evidence of interested witnesses does not have to be accepted at face value, and the extent to which such evidence may be affected by self-interest is for the trier of the facts to determine.” *Seletos v. Comm. of Int. Rev.*, 254 F.2d 794, 797 (C.A. 8, 1958).

CONCLUSION

The circumstantial evidence in this case clearly supports an inference of contributory negligence. The trial court did not err in submitting that issue to the jury. The judgment should be affirmed.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
NATHAN J. HEATH

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 20941

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APPELLANT'S REPLY BRIEF

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HONORABLE GUS J. SOLOMON, Judge

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APPELLANT'S REPLY BRIEF

REPLY IN SUPPORT OF SPECIFICATION OF ERROR

There was no evidence, direct or circumstantial, that plaintiff failed to maintain a proper lookout, or that he loosened the bracing that fell upon him. On the contrary, all of the evidence, including that produced by the defendant, indicated that the sole cause of the collapse of the bracing was the lack of proper "rabbeting" or bracing at the ends of the "toms" which supported the bracing.

ARGUMENT

Far from asserting that the shoring which fell upon plaintiff fell "spontaneously" (Br. 2), plaintiff contends that the sole cause of its fall was the lack of proper bracing as described in the Statement of Facts in plaintiff's opening brief, pages six and seven.

There is no argument that circumstantial evidence, or what is called in Oregon "direct evidence" (ORS 41.080) may be used to prove facts. However, indirect evidence, in order to be probative, must afford an inference of the fact in dispute. Such an inference is based upon the unstated assumption that given the indirect facts, things ordinarily happen in the course of events which prove the fact in dispute.

A careful reading of the case at bar shows that there was no evidence, either direct or circumstantial, which would tend to show negligence on the part of the plaintiff.

Defendant argues that the shoring would not have fallen without human intervention. This is simply not supported by the evidence.

Defendant's witness John Briggs, a walking boss for Jones Stevedoring, testified that although the Georgia-Pacific Dock is located in Coos Bay, you can have some "pretty fair chops" if there is bad weather and wind blowing (Tr. 160, 165).

This evidence, coupled with the testimony of Captain Devanney, that the movement of the ship tied to the dock where there are swells, would cause a pulling

out of the nails at the base of the "toms" (Tr. 67-69), and the additional fact that the accident happened during the winter on December 27, 1963, clearly indicates forces at work which could cause the shoring to collapse.

The defendant stresses that the *S. S. Ohio* crossed the Columbia River Bar in strong winds and winter seas when there would have been considerable pitching, and that the shoring survived this stress. This fact proves only that the shoring was probably weakened during this passage from the Columbia River to Coos Bay.

Defendant stresses that none of the bales of pulp fell. Of course, the shoring could have exerted enough force in and of itself, against the bracings, because the testimony was clear that the shoring itself was very heavy, weighing six or seven hundred pounds (Tr. 8).

Defendant argues that the fact that plaintiff was bending over to pick up a peavey when the shoring collapsed on him indicates that the peavey had been used to loosen the braces which held the shoring in place. Such an inference is not justified in view of the well-known fact that when longshoremen enter a hold to move cargo, various instruments, devices and tools are placed about the hold, and particularly in the restricted area in the square under the hatch which is not occupied by cargo.

Under all of these circumstances, there is absolutely no basis for the statement on page six of defendant's brief that it appears "virtually certain that plaintiff

loosened the bracings himself or knew that his son had done so."

It should be also pointed out that in its brief, defendant has failed to discuss a single one of the cases cited by plaintiff. As can be seen, these cases are very much in point and have a close factual correspondence with the case at bar. Defendant's failure to deal with these cases is an index of the weakness of its legal position.

CONCLUSION

There being no evidence, either direct or circumstantial, of negligence on the part of the plaintiff in the specifications charged in the defendant's answer, it was an error for the trial court to have submitted the issue of contributory negligence to the jury. It is obvious from the extent of injuries suffered by the plaintiff, that this had a devastating effect on the size of the verdict. In this way, plaintiff was prejudiced by the error of the trial court, and the judgment should be reversed and the case remanded for a new trial on the issue of damages only.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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